SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-587

OTIS R. BOWEN, as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;
THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA;
THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

and

DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;
THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA;
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THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA;
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DONNY BRURELL BUCKLEY,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Otis R. Bowen, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, Harold H. Negley, as Superintendent

of Public Instruction of the State of Indiana, the Indiana State Board of Education, a public corporate body, the Metropolitan School District of Decatur Township, Marion County, Indiana, the Franklin Township Community School Corporation, Marion County, Indiana, the Metropolitan School District of Pike Township, Marion County, Indiana, and the Metropolitan School District of Washington Township, Marion County, Indiana, respectfully pray that this Court issue a writ of certiorari to review and reverse, in part, the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the consolidated cause, numbers 73-1968 through 73-1984, on August 21, 1974, reversing in part, affirming in part and remanding said cause to the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court).

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported. A copy of said opinion may be found at pages A-2 through A-33 of the Joint Appendix. The opinions of the District Court are reported at 368 F. Supp. 1191 (S.D. Ind., 1973), and said opinions are appended at pages A-35 through A-103 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1) and Rule 19 (1) (b) of the Rules of this Court, to review a decision of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), which has decided a federal question in conflict with applicable decisions of this court, and to call

for the exercise of this Court's supervisory powers over inferior Federal courts.

The opinion of the Seventh Circuit was entered on August 21, 1974.[1] This petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. Sec. 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

The Petitioners present the following questions for review by this Court:

1. Whether the Seventh Circuit erred in remanding this cause to the District Court for further proceedings regarding the appropriateness of a metropolitan remedy within the "Uni-Gov" boundaries of the City of Indianap-

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1. The parties in the Seventh Circuit who are considered respondents herein are: United States of America; Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein; The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as Superintendent of Schools; Erle A. Kightlinger, as President of the Board of School Commissioners; Jessie Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, Members of the Board of School Commissioners of the City of Indianapolis; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Greenwood Community School Corporation, Johnson County, Indiana; Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corporation, Hancock County, Indiana; Greenfield Community School Corporation, Hancock County, Indiana; Mooresville Consolidated School Corporation, Morgan County, Indiana; Plainfield Community School Corporation, Hendricks County, Indiana; Avon Community School Corporation, Hendricks County, Indiana; Brownsburg Community School Corporation, Hendricks County, Indiana; Eagle-Union Community School Corporation, Boone County, Indiana; Citizens for Quality Schools, Inc.; Coalition for Integrated Education; Hamilton Southeastern Schools, Hamilton County, Indiana; Center Grove Community School Corporation, Johnson County, Indiana; Clark-Pleasant Community School Corporation, Johnson County, Indiana; Southern Hancock County Community School Corporation, Hancock County, Indiana; Northwestern Consolidated School District, Shelby County, Indiana.

olis, Marion County, Indiana, consistent with *Milliken v. Bradley*, 94 S.Ct. 3112, (July 25, 1974), when there was already a finding by the District Court that none of the separate and independent school districts within Marion County, Indiana, other than the Indianapolis Public Schools, was guilty of *de jure* segregation, and when the racial composition of the IPS system was 59% white and 41% black.

2. Whether the Seventh Circuit erred in affirming the District Court's imputation of liability of IPS to the State Defendants, who were never parties to the proceedings in which that liability was established, and who were denied due process of law in that they were denied the opportunity in the District Court to contest the original findings.

3. Whether the Seventh Circuit erred in holding that the Petitioners had not been denied due process of law in the district court.

4. Whether this Court should exercise its supervisory power over inferior Federal courts to compel certain evidence to be considered by those Courts, if there is to be a new trial involving these Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon are the Fifth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. § 2000c-6(a) and IC 1971, 18-4-3-14 as found in Burns' Ind. Stat. Ann. § 48-9213, all of which are appended in the Joint Appendix at pages A-210, A-213, and A-221 respectively.

STATEMENT OF THE CASE

I.

The Case in the District Court

A.

"Indianapolis I[2]"

This petition arises from an opinion issued on August 21, 1974 by the Seventh Circuit affirming in part, reversing in part and remanding a school desegregation case to the District Court for further proceedings.

The original Indianapolis lawsuit was commenced on May 31, 1968 when the United States of America filed a Complaint in the United States District Court for the Southern District of Indiana, Indianapolis Division, which was assigned cause number IP-68-C-225. The action by the United States was brought pursuant to 42 U.S.C. § 2000c-6(a) and (b), and was tried by the Court on July 12-21, 1971. Defendants in the aforementioned complaint were The Board of School Commissioners of the City of Indianapolis, Indiana, its Superintendent of Schools, and members of its Board.

On August 18, 1971, the District Court issued its "Memorandum of Decision" holding that IPS was guilty of *de jure* segregation. The Court permanently enjoined defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them from "discriminating on the basis of race in

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2. The District Court has characterized its various decisions in this matter as follows: Indianapolis I is 332 F. Supp. 655 (S. D. Ind., 1971); Indianapolis II is 368 F. Supp. 1191 (S. D. Ind., 1973); Indianapolis III is 368 F. Supp. 1223 (S. D. Ind., 1973).

the operation of the Indianapolis School System," and further ordered the defendants to take seven steps to "fulfill their affirmative duty to achieve a nondiscriminatory school system." 332 F. Supp. 655, 680. In that regard the Court instructed the Plaintiff to bring in additional parties defendants to seek "such relief as the plaintiff seems justified," (332 F. Supp. 655, 680) including the possibility of the creation of a metropolitan school district for the area of IPS and the surrounding school districts.

The District Court's findings in that trial were that the IPS school board constructed three high school buildings in 1961, 1963, and 1967, the placement of which constituted acts of *de jure* segregation within IPS.

The petitioners herein were never parties to that proceeding, in any manner. They did not present any evidence or examine any witnesses. They did not receive any notice of the proceedings and did not participate in the appeal thereof.

On September 7, 1971, pursuant to the order of the District Court, the United States filed a "Motion to Add Parties Defendant" and an order was entered on the same date which made twelve (12) school corporations defendants in the previously concluded case as directed by the "Memorandum of Decision" issued by the Court as noted above. However, the United States requested no relief against any of those twelve school corporations, and no relief has since been demanded by the United States against those schools or any other added defendants, among which are the Petitioners herein.

On September 10, 1971, the original defendants filed their Notice of Appeal to the Seventh Circuit from the final judgment entered on August 18, 1971.

B.

"Indianapolis II"

On September 14, 1971, a "Motion to Intervene as Party Plaintiff" was filed by Donny Brurell Buckley and Alycia Marquese Buckley who purported to intervene as representatives of a class comprised of Negro school age children in Marion County, Indiana. With that motion a "Complaint in Intervention" was filed, using the same cause number as the previously concluded case, which named the board of School Commissioners of the City of Indianapolis, et al., as defendants, and named John J. Loughlin, as Superintendent of Public Instruction of the State of Indiana, and nineteen school districts as added defendants. The "Complaint in Intervention" was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and the Fourteenth Amendment to the Constitution of the United States.

On October 21, 1971, an Amended Complaint was filed by intervening plaintiffs which named Edgar D. Whitcomb, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, and The Indiana State Board of Education, a public corporate body, as added defendants. It sought relief pursuant 42 U.S.C. §§ 1983 and 1988, 28 U.S.C. §§ 1343(3), 2201 and 2202, and the Fourteenth Amendment to the Constitution of the United States. Joint Appendix p. A-149.

The petitioners and other added defendants filed motions with the District Court asking, in the new trial involving them, that they not be bound by the findings and evidence of the preceding trial and judgment.

In its Entry of December 30, 1971, the District Court stated:

> The Court recognizes that the main thrust of the added defendants' various motions to dismiss the

> intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. *This position is valid.* Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the Court entered before joinder of the added defendants. Joint Appendix p. A-135. (Emphasis supplied.)

In its Entry of February 2, 1973 the District Court set a trial date and stated:

> . . . The trial will be limited to the issues formed on the amended complaint of the intervening plaintiffs, . . . and the answers thereto. Joint Appendix A-118.

In a "Pre-trial Conference" the day before the commencement of the trial in the new action, the District Court reversed itself and held that its findings in the first trial were *res judicata* in the second trial; hence the findings against IPS stood as before. See page A-116 in the Joint Appendix.

Trial of the new action occurred before the District Court on June 12, 1973 through July 6, 1973, and those proceedings were reopened by the Court on its own motion on July 18, 1973. In that trial the parties were as follows:

1.

Indianapolis Public School System Marion County, Indiana

The IPS system is one of eleven (11) in Marion County, Indiana, and is the twenty-ninth largest in the United States. In its 1972-1973 enrollment the IPS system had 97,833 students with a *racial composition of 59 percent white and 41 percent black.* In the former litigation it was found to be a *de jure* segregated school system. Joint Appendix A-157.

2.

State Officials in Indiana

In the second trial the intervening plaintiffs added the Governor, the Attorney General, the Indiana State Board of Education, and the Superintendent of Public Instruction as added defendants. Findings were entered against only the latter two parties, and those findings were that the findings against IPS in the first trial, i.e., that the placement of three high schools constructed in 1961, 1963, and 1967, constituted acts of *de jure* segregation, were "imputed" to the state officials because there was in the State Board of Education a power to review and approve site selections for purposes of insuring minimum health and safety standards. The District Court also found the State officials guilty of "other acts and omissions tending to inhibit desegregation." These were the only findings against any State officials in Indiana. 368 F.Supp. at 1203, Joint Appendix A-54.

3.

Additional School Districts Within Marion County, Indiana

There are ten (10) school systems located in Marion County, Indiana, in addition to IPS. Of those, eight (8) are township schools and two are school systems for the City of Beech Grove, Indi-

ana and the Town of Speedway, Indiana. Their combined enrollment in 1972-73 was approximately 77,611 school children. These school systems have never been illegally segregated nor have they ever operated dual school systems, and the District Court so found. 368 F. Supp. 1203, Joint Appendix A-54, 55.

4.

Additional School Districts Outside Marion County, Indiana

Also included were ten (10) school districts located outside Marion County, Indiana, in six (6) other counties, which were never a part of any Marion County school system, and which, in several instances, have existed since before the Civil War. Their combined 1972-73 enrollment was approximately 27,131 school children. These schools have never been segregated nor have they ever operated dual school systems, and the District Court so found. 368 F. Supp. 1203, Joint Appendix A-54, 55.

The District Court entered orders against all but one of the added defendant school districts even though it found that they were not illegally segregated school systems. 368 F. Supp. 1208-1210, Joint Appendix A-65-70.

Two days after the District Court reopened the proceedings and took evidence, it issued its "Memorandum of Decision." In that Decision the Court found acts of *de jure* segregation on the part of the Indianapolis Public Schools, and that those acts were "imputed" to the Indiana State Board of Education and the State Superintendent of Public Instruction. However, the Court found that there were no *de jure* acts of segregation attributable to any of the added defendant school districts. The District Court also found that the desegregation of the Indianapolis Public School System could not be *permanently*

accomplished within its own boundaries, primarily because of the possibility of resegregation "within a matter of two or three years." 368 F. Supp. at 1198, Joint Appendix A-43, 44.

The District Court did state that it could desegregate IPS within its own boundaries:

> "In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifiable as a black school . . ." 368 F. Supp. at 1198, Joint Appendix A-43.

Therefore, contrary to *Green v. County School Board of New Kent County, Virginia,* 391 U.S. 430 (1968) and *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), the District Court was not looking for a plan that promised realistically to work *now,* but one that promised to work it believed, for all time. Compare *Swann, supra,* at pages 31 and 32.

Notices of appeal to the Seventh Circuit were filed by the original defendants and all added defendants by August 16, 1973, and on September 18, 1973, the United States filed its notice of appeal.

II.

The Case in the Seventh Circuit

The Seventh Circuit heard oral argument on February 20, 1974, and issued its decision on August 21, 1974 affirming the District Court's holding that:

> ". . . the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the opera-

> tion of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries (see Part IV hereof)." (Joint Appendix, A-19.)

Further, the Seventh Circuit reversed the District Court's rulings relating to a metropolitan remedy beyond Marion County, Indiana. It remanded the case to the District Court for further proceedings regarding a multi-district remedy within Marion County, Indiana, which includes eleven (11) separate and independent school corporations. The Seventh Circuit also held that the addition of the added defendants to the second lawsuit (after the Indianapolis I case was already on appeal), and binding those added defendants to the findings of Indianapolis I, was not a denial of due process.

III.

Other Facts Material to Consideration of Questions Presented

A.

The Default Question

On August 27, 1973, the District Court held that the IPS Board of School Commissioners was in default in its obligation to develop adequate desegregation plans for the schools in its district. Joint Appendix A-104. The Seventh Circuit concluded in its opinion of August 21, 1974, that the District Court acted properly in holding the IPS board in default. Joint Appendix, A-15. Therefore, under *Swann*, there was no obligation on the part of any State official or agency to come forward with any desegregation plans until the time that IPS was declared to be in default and refused to proceed. But IPS has never refused to desegregate its system.

B.

Uni-Gov Statute

In 1969 several of the functions of the civil governments of the City of Indianapolis and of Marion County were consolidated into a unified government by the "Uni-Gov Act," IC 1971, 18-4-1-1, *et seq.* Burns' Ind. Stat. Ann. §48-9101 *et seq.* The functions of police and fire protection have not been consolidated. IC 1971, 18-4-12-6 and 7, Burns' Ind. Stat. Ann. § 48-9406 and 9407; IC 1971, 18-4-12-35, Burns' Ind. Stat. Ann. § 48-9442. The governmental functions of airport authority and board; health and hospital corporation and board; county department of welfare and board; county home board; building authority, board of trustees and board of directors; capital improvements board of managers; housing authority; library districts and boards; and school corporations, were not consolidated into one system. See IC 1971, 18-4-3-14, Burns' Ind. Stat. Ann. § 48-9213. Joint Appendix, A-250. The public school systems in Marion County, Indiana have never been a part of the civil government, and were thus omitted from the Uni-Gov statute.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Seventh Circuit Erred in Remanding This Cause for Further Proceedings Regarding The Appropriateness of a Multi-District Remedy When There Was Already a Finding by the District Court That None of the Separate and Independent School Districts Within the Area Sought to be Reconsidered Were Guilty of De Jure Segregation

In *Swann, supra,* this Court clearly established the power of a district court in a school desegregation case, stating at page 16:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation.*
>
> . . . As with any equity case, *the nature of the violation determines the scope of the remedy.* . . . (Emphasis supplied.)

This Court emphatically reaffirmed that principle in *Milliken v. Bradley, supra,* stating at page 3127:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation."

In *Milliken* this Court reversed the Sixth Circuit's metropolitan rulings since the only *de jure* segregation violations found to exist were in the Detroit school district. Thus, the metropolitan remedy visited upon 53 other separate and independent school districts was found to be entirely improper since there were no *de jure* violations by those school districts.

The District Court in this case modeled its "Indianapolis II" decision after the Sixth Circuit's opinion which this Court subsequently reversed. But there was one critical factual distinction: here, the District Court found as a fact that none of the added school systems was segregated systems. Hence, unlike *Milliken,* the finding of no *de jure* segregation in the added school districts was made, and that finding was not contested by any party on appeal in the Seventh Circuit. That finding was respected by the Seventh Circuit in that it reversed the District Court as to all school districts outside Marion County, Indiana, other than IPS. However, the Seventh Circuit *ignored* that finding in regard to the School Districts inside Marion County, Indiana, other than IPS.

In that respect the Seventh Circuit erred. The finding of no *de jure* segregation is one which limits the judicial power of the District Court, under this Court's decisions. That is precisely the effect which that finding also has on the Court of Appeals.

Additionally, in "Indianapolis II" the District Court again found IPS guilty of *de jure* segregation in the site selection and construction of three high schools in 1961, 1963, and 1967, although the District Court refused to allow any of the parties, and especially IPS and the State Defendants, the opportunity to litigate or present evidence on that question. The District Court then "imputed" those findings to the State Defendants, thus to construct, in its mind, a constitutional platform for the extension of its remedial powers to all parties who exist pursuant to state law, namely the State Defendants and all other available defendant school systems in the metropolitan area of Indianapolis, Indiana. Such was this case as it went to the Seventh Circuit. After this Court's decision in ***Milliken v. Bradley, supra*** the Seventh Circuit issued its opinion in the case at bar.

The Seventh Circuit affirmed the finding that IPS was guilty of *de jure* segregation, which no party contested on appeal and it also affirmed that the State defendants were guilty of "various acts and omissions" which promoted segregation and inhibited desegregation, although that Court, like the District Court, never disclosed what those acts were, and that Court, unlike the District Court, made no mention of the school site approvals.

The Seventh Circuit affirmed the findings that there was no *de jure* segregation on the part of the school districts outside Marion County, Indiana, and as to those school corporations, the Court of Appeals reversed the District Court.

The Seventh Circuit then ignored the finding that there was no *de jure* segregation in the school district defendants inside Marion County, Indiana, except IPS, and remanded the case because of a civil government statute entitled "Uni-Gov". Upon remand the ultimate legal question would apparently be whether the Marion County school systems were segregated school systems, a question which already has been answered in the negative by the District Court in "Indianapolis II."

However, the Petitioners would emphatically assert that the finding that all added school district defendants were innocent of *de jure* segregation is controlling in this case, regardless of the outcome of the proceedings for which a remand was ordered.

The Seventh Circuit did not disclose why it was necessary to reconsider the Uni-Gov issue. Petitioners can only conclude that the Seventh Circuit, by permitting the District Court to contemplate a Marion County-Wide remedy, has disregarded the meaning of the findings in the trial court and the significance of this Court's decisions in *Milliken v. Bradley, supra,* and *Swann v. Board of Education, supra.*

The petitioners pray that the writ be granted, that the Court of Appeals be reversed because its decision is contrary to this Court's decisions in *Swann v. Board of Education,* 402 U.S. 1 (1971), and *Milliken v. Bradley,* 94 S. Ct. 3112 (1974), and that they be dismissed from further litigation in this proceeding.

II.

THE SEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT THAT THE STATE OFFICIALS HAVE BY VARIOUS ACTS AND OMISSIONS PROMOTED SEGREGATION AND INHIBITED DESEGREGATION WITHIN THE IPS SYSTEM

Part IV of the District Court's decision of July 20, 1973, is entitled "Responsibility of the State of Indiana." In that section the Court reasoned that since it had found in Indianapolis I that the placement of three high schools within IPS constituted acts of *de jure* segregation, and since "appropriate agencies" of the State Board of Education and the Superintendent of Public Instruction "approved" those sites, those approvals were acts of *de jure* segregation "on the part of officials of the State." 368 F. Supp. at 1203, Joint Appendix, A-54.

The District Court also found that:

> ". . . the failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation. 368 F. Supp. at 1203, Joint Appendix A-54.

These findings gave rise to Conclusions of Law numbers 1 and 2:

1. The acts of *de jure* segregation heretofore found to have been practiced by IPS can be, and are imputed to the State of Indiana.
2. The Superintendent of Public Instruction, the Indiana State Board of Education, and other responsible agents and agencies of the State of Indiana, and the State itself, have practiced de jure segregation, both by commission and by omission. (368 F. Supp. at 1205, Joint Appendix A-58.)

In *Milliken v. Bradley, supra,* this Court said at page 3127:

> ". . . Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial cause of inter-district segregation.* . . ." (Emphasis supplied.)

The issue of school site approvals was a key factor enabling the District Court in the *Milliken* case to find "state action" in Detroit as did the District Court in the case at bar. In *Milliken* this Court said at page 3130 that the:

> ". . . evidence was specifically limited to proof that school site acquisition and school construction within the city of Detroit produced de jure segregation within the city itself. Pet. App., at 144a-151a. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit."

In the Indianapolis case, the District Court found in Indianapolis I that the IPS Board of School commissioners was guilty of *de jure* segregation in constructing three high schools which were located in IPS, in 1961, 1963, and 1967. The District Court then refound that guilt and "imputed" that guilt to the State officials in Indianapolis II. 368 F. Supp. at 1205, Joint Appendix, A-54, 58.

At trial the evidence was massive that there was no causal connection between high school site selection in IPS and racial composition in the schools of Marion County, Indiana.

From the 1968 school year to May 7, 1973, the net increase in Negro students attending schools in the school corporations other than IPS in Marion County, Indiana, was 1,141 or 93.5%, while the net increase in white students attending those same schools was 5,070 or 7.31% (Tr. Exh. Lawrence Q and S). More telling is the fact that the net increase in Negro students attending those same schools from the 1971 school year (the year of the District Court's first decision in this case) to May 7, 1973, was 261, or 12.43%, while in the same period there was a net decrease in white students attending those same schools of minus 97 or minus 1.3%.

The undisputed evidence showed that Negroes moved to the Marion County School systems, including these petitioners, of their choice at a greater rate in number than whites. These facts were specifically disregarded by the District Court, and apparently were not considered by the Seventh Circuit, but those facts demonstrate why there was no causal connection between the three (3) school sites selected inside IPS and the racial composition of the other schools in Marion County, Indiana.

Those facts and findings show why the Seventh Circuit erred in disregarding this Court's decision in *Milliken*, and in permitting some further litigation in the District Court against all of these petitioners.

Further, the only finding by the District Court, affirmed in the Seventh Circuit against the State Defendants, was that they ". . . have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS . . ." But those findings were not specific, they offend Fed. R. Civ. P. 52, and the "acts" are not known to the state defendants.

Perhaps the District Court meant that the State Defendants were in fault when the District Court declared IPS to be in default of its obligation to desegregate on August 27, 1973, or almost two (2) full years after the litigation against the state defendants commenced. However, in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* this Court said that judicial authority enters only when local authority defaults. 402 U.S. at 16.

Thus, the State clearly could not have interposed itself into IPS prior to the declaration of default, or it would have been depriving the IPS Board of School Commissioners of its obligation to "proffer acceptable remedies," and the default did not occur until two (2) years after the litigation against the State Defendants had occurred.

In addition, neither the Plaintiff, the intervening Plaintiffs, the District Court nor the Seventh Circuit have advanced any statutory authority for the State of Indiana to interject itself into the school attendance patterns or affairs of any school district.

In short, there was no conceivable causal connection between the state defendants and the racial composition of any Marion County schools.

Accordingly, the writ should be granted, and that part of the Court of Appeals decision should be reversed.

III

THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE PETITIONERS HAD NOT BEEN DENIED DUE PROCESS OF LAW

Throughout this litigation the State Defendants have asserted that they have been denied due process of law by the District Court's holding that the findings of Indi-

anapolis I were *res judicata* in Indianapolis II. This argument is especially relevant now since IPS's guilt found in Indianapolis I was "imputed" to the State Defendants in Indianapolis II, but the Seventh Circuit made no specific findings against those Defendants.

In addition, the State Defendants and other Petitioners were brought into the litigation by intervening plaintiffs who also were not parties in Indianapolis I, (but who nevertheless benefited from its findings) after the original defendants had all filed notices of appeal to the Seventh Circuit.

The Seventh Circuit answered this argument by citing a previous order it had issued in this cause on August 10, 1973, wherein it cited *Plaquemines Parish Commission Council v. United States*, 416 F.2d 952, 954 (5th Cir., 1969), that: "The District Court did not *lose* jurisdiction of the *parties* merely because an appeal was pending . . ." (Emphasis supplied.) Thus, the Seventh Circuit missed the point that *neither* the Intervening Plaintiffs nor the Petitioners were *parties* to the original proceeding, nor could they have been pursuant to 42 U.S.C. § 2000c-6(a).

It is well established that such action on the part of the district Court constituted a denial of due process of law. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) and *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

IV.

THE DECISION BELOW CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER OVER INFERIOR FEDERAL COURTS, INVOLVING THE KIND OF EVIDENCE AND SOCIAL ANALYSIS WHICH A DEFENDANT SCHOOL BOARD CAN USE IN ATTEMPTING TO EFFECT A PUPIL-PLACEMENT PLAN IN A NON-SEGREGATED SCHOOL SYSTEM.

During the course of the trial the District Court excluded testimony by two of the added defendants' expert witnesses, Dr. David J. Armor and Dr. Ernest van den Haag. Dr. van den Haag appeared at the trial and his excluded testimony was adduced through an offer to prove. (Tr. 2229.) Dr. David Armor did not appear at the trial, but his testimony was offered through Speedway Exhibit No. M. (E. 120.) This Exhibit was a copy of Dr. Armor's publication in *The Public Interest* entitled "The Evidence of Busing." It was agreed among all parties and the District Court that if Dr. Armor would have testified at the trial his testimony would have been to the facts and conclusions stated in such article, that the court would have excluded any such testimony, and that the necessity of calling Dr. Armor as a witness was obviated by introduction of such Exhibit as an offer to prove. (Tr. 2200.)

The article by Dr. Armor was based upon statistical studies made of "induced" integration in Boston, Massachusetts, White Plains, New York, Ann Arbor, Michigan, Riverside, California, Hartford and New Haven, Connecticut, Evanston, Illinois, and other areas of the United States. "Induced" integration was defined by Dr. Armor as voluntary or mandatory integration brought about by governmental action. Dr. Armor evaluated the students involved in such programs with respect to their achieve-

ment, aspirations, self esteem, race relations and opportunities for higher education. With respect to these subjects, Dr. Armor's findings indicated that in many areas induced integration was counter-productive or that the students involved in the programs received little or no benefit. Dr. Armor concluded his findings by stating that mandatory busing programs could result in adverse sociological and psychological effects on the children involved in such programs, that prejudice, racial identity, solidarity and desire for separatism were usually enhanced rather than diminished, and that over the short run busing for purposes of integration did not lead to significant gains in student achievement or interracial harmony. In Dr. Armor's opinion, it was more desirable to stress natural integration brought about by individual choice. (Tr. Ex. Speedway M.)

Dr. van den Haag is a sociologist and psychologist. His testimony dealt with the sociological and psychological impact of integration or desegregation. In sum, his excluded testimony was to the effect that: (a) Contact between the races does not reduce prejudice; and (b) Integration (as distinguished from desegregation) may heighten racial identity and reduce the opportunity for actual contact between the races. (Tr. 2216-2269.)

In its opinion the District Court stated that it could "think of no more important form of special education for a Negro child than going to school in an integrated environment." Joint Appendix A-66. Since the District Court was considering whether a large scale white majority, metropolitan busing program should be implemented to effect this concept, it would only seem logical that the Court should have considered the impact which such a program might have upon the children who would be involved. The District Court, however, considered itself

precluded from receiving any such evidence even if it tended to prove that children involved in such a program might be harmed psychologically. (Tr. p. 1827.)

Additionally, the District Court stated at trial:

> "[T]he plaintiff's case, as I understand it, [is] on the subject of whether or not a stable or workable, *lasting system of desegregation* can be accomplished within the boundaries of the Indianapolis School System, which is certainly one of the key questions in this case * * *" (Tr. 2227). (Emphasis supplied.)

The Armor-van den Haag evidence was offered to assist in determining whether a court could effect the kind of plan which the District Court sought, and it was offered to reply to plaintiffs' extensive evidence on direct and cross-examination.

The issue as stated by the District Court was misconceived, and contrary to this Court's standards in *Swann v. Board of Education, supra,* at 31 and 32, in that a desegregation plan for all time to come is not the purpose of the remedy and it is not the duty of any school board defendant. No doubt the duty can never be that because no school board has the power which would be required to implement the District Court's concept and issue in this case.

The Seventh Circuit totally failed to understand the significance of the proffer, Jt. App. A-30. None of the school districts or state petitioners in this petition ever challenged the constitutional doctrine which was established in this Court's decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), and none of the school board petitioners have ever been in violation of that law, and the District Court so found.

The significance of the proffer is that there is no school board petitioner herein which is a segregated system, but

the District Court wanted a pupil-placement program for all of Marion County, Indiana, which it will call a "desegregation remedy", regardless of the consquences to the children involved.

The proffer of this evidence went to the question of whether such a program can be developed, assuming *arguendo* that the burden for doing so is attached to the defendants. This evidence would have presented powerful sociological and psychological facts which advise against the imposition of such a program.

That the program was the essence of the intervening plaintiffs case against the non-segregated school defendant petitioners, and by their rulings, the District Court and the Seventh Circuit failed to accept the proposition that in litigation each side is entitled to present evidence to the issues which evolve.

Fortunately, not every Court of Appeals judge has failed to understand that principle. In dissenting in *Bradley v. Milliken*, 484 F.2d 215, 270 (6th Cir., 1973), Judge Weick said:

> "The Supreme Court in Brown I relied heavily on testimony of sociolotists as to the adverse effect of segregation on the educational achievement of Negro children. It is inconceivable that the District Court would hold contrary testimony of a sociologist irrelevant and exclude it. This was prejudical error. *In a court of Justice not merely one side but both sides are entitled to offer evidence.*" (Emphasis supplied.)

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5881

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, AND THE SCHOOL CITY OF BEECH GROVE, INDIANA,
Petitioners,

vs.

UNITED STATES OF AMERICA, DONNY BRURELL BUCKLEY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. .....

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, AND THE SCHOOL CITY OF BEECH GROVE, INDIANA,

Petitioners,

vs.

UNITED STATES OF AMERICA, DONNY BRURELL BUCKLEY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners The School Town of Speedway and The School City of Beech Grove, Indiana, pray that a Writ of Certiorari issue to review the decision rendered in this cause on August 21, 1974, by the United States Court of Appeals for the Seventh Circuit.[1]

---

1. A complete list of respondents is as follows: United States of America; Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein; The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as Superintendent of Schools; Erle A. Kightlinger, as President of The Board of School Commissioners; Jessie Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, Members of the Board of School Commissioners of the City of

OPINIONS AND ORDERS BELOW

1. The decision of the United States District Court for the Southern District of Indiana, finding that the Board of School Commissioners of the City of Indianapolis, Indiana, had engaged in segregatory practices, is reported at 332 F. Supp. 655 (S.D. Ind. 1971), and appears in the Joint Appendix[2] at p. A-157. This decision was affirmed, 474 F.2d 81 (7th Cir. 1973), *cert. denied,* 413 U.S. 920 (1973), Joint Appendix at p. A-119.

Indianapolis; Otis R. Bowen, as Governor of the State of Indiana; Theodore Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Greenwood Community School Corporation, Johnson County, Indiana; Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corporation, Hancock County, Indiana; Greenfield Community School Corporation, Hancock County, Indiana; Mooresville Consolidated School Corporation, Morgan County, Indiana; Plainfield Community School Corporation, Hendricks County, Indiana; Avon Community School Corporation, Hendricks County, Indiana; Brownsburg Community School Corporation, Hendricks County, Indiana; Eagle-Union Community School Corporation, Boone County, Indiana; The Indiana State Board of Education, a public corporate body; Citizens for Quality Schools, Inc.,; Coalition for Integrated Education; Hamilton Southeastern Schools, Hamilton County, Indiana; Center Grove Community School Corporation, Johnson County, Indiana; Clark-Pleasant Community School Corporation, Johnson County, Indiana; Southern Hancock County Community School Corporation, Hancock County, Indiana; Northwestern Consolidated School District, Shelby County, Indiana.

2. The term "Joint Appendix", sometimes abbreviated "Jt. App.", refers to the "Joint Appendix of Petitioners For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit", filed herein by petitioners and others.

2. The Order on Petition to Intervene entered by the United States District Court for the Southern District of Indiana on September 14, 1971, is unreported and appears at Joint Appendix at p. A-138.

3. The Entry of such District Court made December 30, 1971, ruling on certain motions, is unreported and appears at Joint Appendix p. A-135.

4. The Trial Notice Entry of such District Court dated February 2, 1973 is unreported and appears at Joint Appendix p. A-118.

5. The Entry for June 11, 1973, of such District Court is unreported and appears at Joint Appendix p. A-116.

6. The Memorandum of Decision of such District Court handed down on July 20, 1973, is reported at 368 F. Supp. 1191 (S.D.Ind. 1973), and appears at Joint Appendix p. A-35.

7. The Supplemental Memorandum of Decision of such District Court, dated December 6, 1973, is reported at 338 F. Supp. 1223 (S.D. Ind. 1973) and appears at Joint Appendix p. A-83.

8. The Opinion of the United States Court of Appeals for the Seventh Circuit decided August 21, 1974 is unreported and appears at Joint Appendix p. A-2.

9. The Order of the United States Court of Appeals for the Seventh Circuit, dated October 3, 1974, denying petitions for rehearing, is unreported and appears at Joint Appendix p. A-34.

JURISDICTION

The judgment and decree of the United States Court of Appeals for the Seventh Circuit was entered August 21, 1974. Petitioners filed their Petition for Rehearing on September 3, 1974. Such Petition was denied by the Court of Appeals on October 3, 1974.

This petition for certiorari is filed within ninety days of October 3, 1974. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether any legal basis exists for imposition of an inter-district remedy in a multi-district school desegregation case where one district, the Indianapolis Public School System (IPS), was adjudged to have effected a dual school system, but petitioners were found not to have committed any acts of segregation or discrimination, and at all times operated separate, independent unitary school systems for and within the separate municipalities of the Town of Speedway and City of Beech Grove, Indiana.

II.

Whether legislation which consolidated city and county forms of government, but did not change the jurisdictions, boundaries or operations of eleven separate, independent school corporations, can be held to be violative of the Constitution, where one of such school corporations operated segregated schools but the other ten such corporations were affirmatively found not to have committed any acts of discrimination or segregation and operated unitary school systems.

III.

Whether petitioners were denied due process of law by the Courts below which held that petitioners were bound by a judgment of segregation made against IPS, although that judgment was made in a trial and action in which petitioners were never parties and petitioners were precluded from litigating such issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions and statutes relevant to the issues in this case are: U. S. Constitution Amendments V, X and XIV; Indiana Acts 1969, Ch. 173, p. 357, I.C. 1971 18-4-1-1 to 18-4-5-4; Burns Ind. Stats. §§ 28-1701 through 28-1712, Ind. Acts 1965, ch. 307. All of such provisions are set forth in pertinent part in the Joint Appendix, p. A-120 *et seq.*

STATEMENT OF THE CASE

Petitioners The School Town of Speedway, Indiana, and The School City of Beech Grove, Indiana, are school corporations created and existing under Indiana law. They own and operate school systems which serve respectively, the civil Town of Speedway and the civil City of Beech Grove, Indiana, two communities located adjacent to the City of Indianapolis, Indiana. Speedway, Beech Grove and Indianapolis are all located in Marion County, Indiana.

All public schools within Marion County are owned and operated by a total of eleven independent school corporations, including petitioners. Of these, eight are township school systems which had a 1972-73 combined student population of 72,083.[3] The Indianapolis Public School System (IPS) is located entirely within the former boundaries of the City of Indianapolis. In 1972-73 IPS enrolled 97,833 students, with a racial composition of approximately 60 percent white and 40 percent black.

3. The eight township school systems in Marion County are: The Metropolitan School District of Decatur Township, Marion County; The Franklin Township Community School Corporation, Marion County, Indiana, The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; and The Metropolitan School District of Wayne Township, Marion County, Indiana.

During 1972-73, petitioner The School Town of Speedway enrolled 2,417 students and petitioner The School City of Beech Grove had a student population of 2,747. The boundaries of such School Town and School City are coterminous respectively with the civil Town of Speedway and the civil City of Beech Grove.

The City of Beech Grove is governed by an elected Mayor and seven-man council form of government. The Mayor appoints various members of his administration, including the City Attorney, Chief of Police, the Chief of the Fire Department and various other city employees. The City has its own separate police, fire, park and sanitation districts, street maintenance and other similar services.

The Town of Speedway is governed by an elected town board of trustees. The town board is empowered to control all other municipal departments and to appoint their administrators. These additional departments administer fire and police protection, sanitary services, street construction and maintenance, park facilities and water works for the citizens of the Town of Speedway.

The School City of Beech Grove is governed by a five-man board of school trustees, appointed by the common council of the City of Beech Grove. Likewise, the administration of the School Town of Speedway is vested in a three-man board of school trustees who are appointed by the Town board. The school trustees are statutorily vested with power to govern the school corporation, including the power to hold and own real estate in the name of the School City or Town. Both of these boards of school trustees in turn appoint a school superintendent with general day-to-day administrative duties and responsibilities.

Neither petitioners nor the communities they serve have ever been a part of IPS or the City of Indianapolis. Petitioners are, under Indiana law, separate corporations with the power

to sue and be sued, to tax and issue bonds for school purposes, to acquire and hold title to real and personal property, and to generally administer their educational facilities and programs. *Burns Ind. Stats.* §§ 28-1701 through 28-1712, *Ind. Acts* 1965, ch. 307. (Jt. App. p. A-214)

Indianapolis I

What has come to be known as *Indianapolis I* began on May 31, 1968, when the United States of America filed suit under 42 U.S.C. § 2000c-6 against the Board of School Commissioners of the City of Indianapolis (I.P.S.) and its Superintendent. On August 18, 1971, the district court found that IPS had operated a segregated school system. *U.S.* v. *Board of School Commissioners,* 332 F. Supp. 655 (S.D. Ind. 1971). (Jt. App. p. A-157)

In its opinion the district court speculated that any plan of desegregation limited to IPS might not "work" because of a possible "exodus" of white families from the area served by IPS. The decision also focused in part on the "Consolidated First Class Cities and Counties Act", commonly known as "Uni-Gov". *Indiana Acts* 1969, Ch. 173, p. 357, I.C. 1971 18-4-1-1 to 18-4-5-4. (Jt. App. p. A-221) This legislation was passed in order to consolidate the governmental functions theretofore performed by the City of Indianapolis and Marion County. The boundaries of the new City of Indianapolis were generally extended by Uni-Gov to the boundaries of Marion County, with certain exceptions. The City of Beech Grove and the Town of Speedway were, however, unaffected by Uni-Gov in their status as separate municipal corporations. 332 F. Supp. at p. 676, f.n. 93. (Jt. App. p. A-198)

The Uni-Gov legislation made no change in the jurisdiction, boundaries, territories served or operations of petitioners or any other school corporation in Marion County. As stated by the District Court:

> "The Uni-Gov Act provides expressly that 'any school corporation, all or a part of the territory of which is in

> the consolidated city or county' shall not be affected by the Act. Thus Uni-Gov leaves the defendant School City [IPS] exactly where it found it: confined to an area in the central part of the consolidated City of Indianapolis, where it is surrounded by eight township school systems operating independently within the purportedly unified City, and by two additional independent school corporations operated by Beech Grove and Speedway City. . . ." 332 F. Supp. at 676. (Jt. App. p. A-198)

Despite the fact that Uni-Gov made no alteration in the Marion County schools, the trial court was critical of its effect. The court felt that it was required to fashion a decree which would provide a "stable" racial balance or mix within IPS. This end, the Court reasoned, could not be accomplished unless the Court could require not only all Marion County schools but also schools outside of the county to participate in a multi-district remedy.

> "Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's [IPS] jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County." *Id.* at 679. (Jt. App. p. A-204)

Plaintiff United States was ordered to file appropriate pleadings to secure the joinder of additional school corporations. Although the United States took steps to serve the additional defendants with summons', it failed to file any claims or complaints against them.

Indianapolis II

Because of the refusal of the United States to follow the Court's instruction, the plaintiffs Buckley were allowed to intervene. (Jt. App. p. A-138) Eventually, petitioners and eighteen other school corporations within and without Marion County,

and certain state officials, were made defendants to answer to the allegations of intervenors' complaint. That complaint alleged that petitioners and the other defendants had committed discriminatory and segregatory acts and that the Uni-Gov legislation was unconstitutional. (Jt. App. pp. A-143-148) *Indianapolis II*, as the courts below styled it, had begun.

Petitioners were concerned from the outset with the prospect of being bound in any way by the evidence, findings or judgment entered in *Indianapolis I*, and a number of motions were filed raising this issue. In its entry dated December 30, 1971, the trial court ruled upon such motions and stated:

> "The court recognizes that the main thrust of the added defendants' various motions to dismiss the intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. This position is valid. Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the court entered before joinder of the added defendants." (Jt. App. p. A-136)

On January 28, 1972, petitioners and a number of the added defendants filed their "Joint Motion of Certain Defendants to Clarify or Modify Court Entry of December 30, 1971." That Motion alleged an ambiguity in the Court's Entry of December 30, 1971 in that such Entry did not specifically state that previous testimony, as well as previous findings, would not be binding upon the added defendants. The motion thus sought an order from the Court that evidence taken previously in the original cause brought by the United States would not be admissible in the trial of the issues raised by the amended complaint of the plaintiff-intervenors. On January 3, 1973, the trial court entered a "Memorandum of Decision" in which

it held in response to this Motion that "the Court's Entry of December 30, 1971 speaks for itself, and no clarification is deemed necessary."

In an Entry of February 2, 1973, the district court set the instant action for trial and stated that:

> "The trial will be limited to the issues formed on the Amended Complaint of the intervening plaintiffs, Donny Brurell Buckley and Alycia Marquese Buckley and the answers thereof." (Jt. App. p. A-118)

On June 11, 1973, one day before the trial of the instant action commenced, the district court *sua sponte* ruled for the first time at a "pre-trial conference" that the judgment of August 18, 1971 holding that IPS operated a segregated school system would be *res judicata* in the trial of the action brought by the intervening plaintiffs Buckley. (Jt. App. p. A-117) On the first day of trial, June 12, 1973, certain of the added defendants, including petitioners, filed their written objections to that ruling.

Following a lengthy trial, the District Court held on July 20, 1973 that: (1) desegregation of IPS on a 60% white—40% black ratio could be achieved; (2) but that ratio would not be "stable" and IPS would have a black majority within two or three years; (3) the State officials-defendants were responsible for the segregatory acts of IPS and those acts were "imputed" to the State; and (4) petitioners and the other added defendants school corporations had not committed any acts of discrimination or segregation. (Jt. App. p. A-35)

To "cure" the State's Constitutional violations the trial court, with certain exceptions, ordered IPS to transfer a designated percentage of black students to the added defendants' schools. (Jt. App. pp. A-67-68) On December 6, 1973, the District Court issued its Supplemental Memorandum of Decision, primarily directed to the Indiana State Legislature and containing "guidelines" as to legislation which the court requested the Indiana State Legislature to enact in order to form a metropolitan

school system for students in Marion County and the adjoining counties. (Jt. App. p. A-83)

At the conclusion of such Memorandum, the Court vacated its pupil transfer orders but continued in effect other orders requiring "in service training courses" for faculties and staff. (Jt. App. pp. A-101-102) The Court, however, certified its pupil transfer orders and conclusions of law, contained in *Indianapolis II*, for appeal as provided in 28 U.S.C. § 1292(b). (Jt. App. p. A-102)

The trial court's decision in *Indianapolis II* was appealed to the Seventh Circuit Court of Appeals. In an opinion dated August 21, 1974, that Court:

> (1) affirmed the trial court's findings against the "State" and the State officials-defendants;
>
> (2) reversed the trial court's findings and orders "insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries";
>
> (3) vacated the trial court's rulings and orders "insofar as they pertain to a remedy within the boundaries of Uni-Gov", and remanded the case to the district court "for further proceedings consistent with" this Court's decision in *Milliken* v. *Bradley*, ... U.S. ....., 41 L.Ed. 2d 1069 (1974). The trial court was directed to "determine whether the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken;" and
>
> (4) affirmed the trial court's decision holding that petitioners and the other added defendants were bound by the judgment of segregation made against IPS in *Indianapolis I*. (Jt. App. p. A-32)

Petitioners filed their Petition for Rehearing on September 3, 1974. That Petition was denied on October 3, 1974.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Decision Below Is in Conflict With This Court's Decision in Milliken v. Bradley

In *Milliken* v. *Bradley*, upon facts similar in many respects to the instant action, this Court held:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the inter-district sgeregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy." 41 L.Ed. 2d 1091.

Here the Court of Appeals has remanded this action to the district court in order to "determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." This part of the Seventh Circuit's opinion contemplates further action against petitioners to effect a multidistrict remedy, and under the facts of this case and the teaching of *Milliken*, is in error.

Before an inter-district remedy may be imposed, *Milliken* requires: (1) "a constitutional violation in one district that produces a significant segregative effect in another district";

or (2) that "racially discriminatory acts of the state or local school districts or of a single school district have been a substantial cause of inter-district segregation." In the instant case segregation has been found in only one district and all other districts were affirmatively adjudged to have operated unitary, nondiscriminatory systems.

The enactment of Uni-Gov, therefore, cannot possibly "warrant an inter-district remedy." As pointed out above, that legislation did nothing to alter or change the school jurisdictions, boundaries and operations which have existed in Marion County for more than half a century. The boundaries and jurisdictions of petitioners and the municipalities which they serve, and the boundaries and jurisdictions of IPS and all other school corporations in Marion County were totally unaffected by Uni-Gov. But no matter what the effect of Uni-Gov has been, there is no basis for further proceedings on remand because, on this record, there is a total absence of inter-district segregation.

In *Milliken* this Court considered the effect of legislation which rescinded Detroit's voluntary desegregation plan. In rejecting a contention that such legislation constituted an act of segregation this Court stated:

> "That plan . . . had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tri-county area." 41 L. Ed. 2d 1094.

So, too, in the case at bar, there can be no factual, logical or legal causal connection between the distribution of pupils by race in Marion County and the Uni-Gov legislation. To paraphrase *Milliken:* "Disparate treatment of White and Negro students occurred within [IPS] and not elsewhere, and on this record the remedy must be limited to that system." 41 L.Ed.2d 1092.

2. The Decision Below Is in Conflict with Spencer v. Kugler and Other Parallel Decisions

Petitioners are independent school corporations serving a Town and City separate from the municipality of Indianapolis. Their position in this litigation is therefore squarely governed by *Spencer* v. *Kugler*, 326 F.Supp. 1235 (D.N.J. 1971) aff'd. 454 F.2d 829 (3rd Cir. 1972) aff'd. *per curiam*, 404 U.S. 1027 (1972). In that case the plaintiffs attacked New Jersey statutes which provided that:

> "Each municipality shall be a separate local school district except as otherwise provided in this chapter and except that each incorporated village shall remain a part of the district in which it is situated at the time of its incorporation." 326 F.Supp. 1240.

These provisions were attacked by the plaintiffs on the ground that they reinforced and solidified racially imbalanced municipalities and their school systems. In dismissing the plaintiffs' Complaint, the three-judge district court stated:

> "It is clear that these Legislative enactments prescribe school district boundaries in conformity with municipal boundaries. This designation of school district zones is therefore based on the geographic limitations of the various municipalities throughout the State. Nowhere in the drawing of school district lines are considerations of race, creed, color or national origin made.
>
> *The setting of municipalities as local school districts is a reasonable standard especially in light of the municipal taxing authority.* The system as provided by the various Legislative enactments is unitary in nature and intent and any purported racial imbalance within a local school district results from an imbalance in the population of that municipality—school district. *Racially balanced municipalities are beyond the pale of either judicial or Legislative intervention.*" 326 F.Supp. 1240. (Emphasis supplied.)

The decision of the Third Circuit Court of Appeals and the United States Supreme Court in affirming this decision is dis-

positive of the issues raised by plaintiffs in this case against petitioners.

The opinion of the Seventh Circuit Court of Appeals in this case is also in conflict with *Bradley* v. *School Bd. of City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), aff'd. by an equally divided court, 412 U.S. 92 (1973), *Keyes* v. *School District No. 1, Denver Col.*, 413 U.S. 189 (1973), and *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *Richmond* proscribed an inter-district remedy involving school districts which were coterminous with city and county boundaries absent an affirmative showing that such boundaries were established and maintained in violation of a federally protected right. *Swann* and *Keyes* held that the nature of the violation must determine the scope of the remedy and that separate, identifiable and unrelated schools cannot be involved in inter-district remedies.

3. Petitioners Have Been and Will Continue to Be Deprived of Due Process of Law

The Courts below held petitioners bound under the doctrine of res judicata by the judgment entered in *Indianapolis I* that IPS operated a dual school system. That judgment underpinned the entire trial and decision from which this appeal is taken. Petitioners were not parties to the action in which such judgment was entered and were affirmatively foreclosed by the trial and appellate courts from litigating this fundamental issue. Now the Court of Appeals has held that petitioners will still be bound by such adjudication while the trial court decides whether Uni-Gov "warrants an inter-district remedy."

This Court in a number of decisions has proscribed on Constitutional principles action similar to that taken by the courts in the instant case. As stated in *Hansberry* v. *Lee*, 311 U.S. 32 (1940):

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in

> personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require . . ." 311 U.S. 40-41. [citations omitted.] See also, *Mullane* v. *Central Hanover Bank & Tr. Co.*, 332 U.S. 306 (1950).

This elementary aspect of due process was recently reiterated in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) where this Court stated:

> "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." 402 U.S. 329.

Other Supreme Court authorities which support petitioners' position are: *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), (parent corporation not lible for the acts of its subsidiary under the doctrine of *res judicata*); *In Re Howard*, 76 U.S. 175 (1870), (claimants to a fund not concluded by prior adjudication to which they were not parties even though the prior actions involved similar parties with similar claims and had been affirmed by the United States Supreme Court); and *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955). See also the remarkably similar case of *Northern Bank of Kentucky* v. *Stone*, 88 Fed. 413 (C.C.D. Ky. 1898), opin. by Taft, J.

Undoubtedly, the zeal of the courts below in attempting to expeditiously effect a remedy led to the determination that the earlier judgment would be *res judicata*. However, as stated in a recent landmark case:

"But none of these considerations justify disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by Congressional mandate, or by the Federal Rules of Civil Procedure. . . . It is an historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protection against oppressions, including oppressions by those whose intentions may be above reproach." *Eisen* v. *Carlisle & Jaquelin*, 479 F.2d 1005 (2nd Cir. 1973).

4. Court of Appeals Has Decided Important Issues of Law Fundamental to the Further Conduct of This Case

The Seventh Circuit's order of remand does not detract from the merits of this Petition. A writ of certiorari was granted in *Milliken* notwithstanding the remand orders contained in the opinion of the Sixth Circuit. This Court has also repeatedly held in other cases that a writ of certiorari may issue notwithstanding a remand of the case by the Court of Appeals if there is present an important and clear cut issue of law fundamental to the further conduct of the case. *U.S.* v. *G.M.C.*, 323 U.S. 373 (1944); *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148 (1964); *Land* v. *Dollar*, 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The issues discussed in this Petition meet these criteria.

CONCLUSION

This school litigation has been before the lower courts for almost seven years and now affects over 170,000 pupils. The foregoing shows that the Seventh Circuit Court of Appeals has decided important questions of federal law which will govern the further conduct of this case and which are in conflict with applicable decisions of this Court. A writ of certiorari should issue to review that decision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-605

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ————

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, The Board of School Commissioners of the City of Indianapolis, Indiana, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of The United States Court of Appeals for the Seventh Circuit entered in this matter on August 21, 1974.

OPINIONS BELOW

The August 21, 1974, opinion of the Court of Appeals, as yet unreported, is reprinted in the Joint Appendix to this

Petition at pages A-2 through A-34.[1] The July 20, 1973, opinion of the United States District Court for the Southern District of Indiana, as corrected November 12, 1973, and further supplemented on December 6, 1973, reported at 368 F.Supp. 1191, is reprinted at Jt.A. p. A-35 through p. A-103. The orders of the District Court dated August 27, 1973, *nunc pro tunc* to August 20, 1973, and August 30, 1973, are reprinted at Jt.A. p. A-104 and p. A-111.

The initial Memorandum of Decision of the United States District Court, entered August 18, 1971, wherein these Petitioners were found guilty of *de jure* segregation, is reported in 332 F.Supp. 655, and was affirmed by the United States Court of Appeals for the Seventh Circuit on February 1, 1973, which decision is reported at 474 F.2d 81, *cert.den.* 407 U.S. 920, 93 S.Ct. 3066 (1973). Both of these latter opinions have been reprinted at Jt.A. p. A-119 and p. A-157.

JURISDICTION

The Board of School Commissioners of the City of Indianapolis, Indiana, Erle A. Kightlinger and Mrs. Carrie Jacobs (both of whom have been succeeded in office by William M. Myers, Sr. and Martha B. McCardle), Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez and W. Fred Ratcliff, members of The Board of School Commissioners of the City of Indianapolis, and Karl R. Kalp, as Superintendent of Schools, are Petitioners herein. The United States of America, and Donny Brurell Buckley

1. These Petitioners have agreed to file a Joint Appendix with Otis R. Bowen, Governor of the State of Indiana, Theodore L. Sendak, Attorney General of the State of Indiana, Harold H. Negley, Superintendent of Public Instruction of the State of Indiana, the Indiana State Board of Education, and the ten independent school systems located in Marion County, Indiana, all of which were parties to these proceedings in the courts below, and almost all of which have indicated that they will either jointly or individually file Petitions for Writs of Certiorari in this case. The Joint Appendix will be filed by the party first filing its Petition for Writ of Certiorari. Citations to the Joint Appendix will be given in this Petition as "Jt.A. p. ——."

and Alycia Marquese Buckley, on behalf of themselves and all Negro school age children residing in the area served by original Defendants herein, are the Respondents herein.*

The judgment of the Court of Appeals was entered on August 21, 1974. The Petition for Certiorari was filed less than ninety (90) days from the date of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit erred in disregarding this Court's opinion in *Milliken v. Bradley*, — U.S. —, 41 L.Ed.2d 1069, 94 S.Ct.

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*A complete list of additional respondents is as follows: Otis R. Bowen, as Governor of the State of Indiana; Theodore Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Greenwood Community School Corporation, Johnson County, Indiana; Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corporation, Hancock County, Indiana; Greenfield Community School Corporation, Hancock County, Indiana; Mooresville Consolidated School Corporation, Morgan County, Indiana; Plainfield Community School Corporation, Hendricks County, Indiana; Avon Community School Corporation, Hendricks County, Indiana; Brownsburg Community School Corporation, Hendricks County, Indiana; Eagle-Union Community School Corporation, Boone County, Indiana; The Indiana State Board of Education, a public corporate body; Citizens for Quality Schools, Inc.; Coalition for Integrated Education; Hamilton Southeastern Schools, Hamilton County, Indiana; Center Grove Community School Corporation, Johnson County, Indiana; Clark-Pleasant Community School Corporation, Johnson County, Indiana; Southern Hancock County Community School Corporation, Hancock County, Indiana; Northwestern Consolidated School District, Shelby County, Indiana; The School Town of Speedway, Indiana; The School City of Beech Grove, Indiana.

3112 (1974), when it remanded this cause to the District Court for further proceedings to determine the appropriateness of a multi-district desegregation remedy within Marion County, Indiana, involving some eleven separate and independent school systems with a total 1972 enrollment of approximately 174,000 children, when

(a) the only school system found to be *de jure* segregated was the Indianapolis Public Schools (hereinafter sometimes referred to as "IPS") which has a racial composition of approximately fifty-nine per cent (59%) white and forty-one per cent (41%) black students, and

(b) the remaining school systems located within Marion County were expressly found by the Court not to be *de jure* segregated, which finding was affirmed by the Court of Appeals, and

(c) when the rationale for the entire proceeding in the District Court was based upon the opinion of the United States Court of Appeals for the Sixth Circuit in *Bradley v. Milliken,* 484 F.2d 215 (6th Cir., 1973), reversed and remanded, *Milliken v. Bradley, supra.*

2. Whether the courts below erred in ordering The Board of School Commissioners of the City of Indianapolis, Indiana to apply for all available federal funds to assist in desegregation, which order will have the effect of placing all educational programs conducted with these funds under the supervision and control of the Federal Government, thereby depriving the School Board of its right and duty to control the education process in its schools, when there has been no showing that there are insufficient local funds available to the School Board to conduct all programs necessary to effectuate desegregation within the Indianapolis Public Schools.

3. Whether the courts below erred in holding that The Board of School Commissioners of the City of Indianapolis, Indiana, was in default of its constitutional obligation to desegregate the Indianapolis Public Schools, and by replacing the Board of School Commissioners with Court-appointed School Commissioners, and in assigning the entire professional planning staff of IPS to the exclusive service and control of the Court-appointed Commissioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Tenth and the first section of the Fourteenth Amendments to the Constitution of the United States, and *42 U.S.C., Sec. 2000C-6(a) and (b).* These provisions have been reprinted at Jt.A. p. A-210 to A-214.

Also of significance are certain Indiana statutes, *Indiana Code, 1971, Sec. 18-4-1-1 through 18-4-6-3* (hereinafter referred to collectively as "Uni-Gov"[2]); *Indiana Code, 1971, Sec. 18-4.5-5-9;* and *Indiana Code, 1971,*[3] *Secs. 20-5-2-1 through 20-5-2-3.* These statutes have been reprinted at Jt.A. p. A-214 through p. A-276.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Southern District of Indiana was invoked pursuant to *42 U.S.C., Sec. 2000C-6(a) and (b),* and *28 U.S.C., Sec. 1345.*

On May 31, 1968, the United States of America filed a school desegregation action in the United States District

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2. Only the pertinent provisions of the Uni-Gov Act, the full title of which is the "Consolidated First Class Cities and Counties Act," have been reprinted in the Joint Appendix.

3. The Indiana Code, 1971, will be hereinafter cited as "I.C. (1971), ——."

Court for the Southern District of Indiana, The Honorable S. Hugh Dillin, presiding trial judge. The Defendants in said cause were The Board of School Commissioners of the City of Indianapolis, Indiana, and its individual members (hereinafter sometimes referred to as the "Indianapolis School Board"). On August 18, 1971, the trial judge filed a Memorandum of Decision in favor of the Plaintiff, United States of America, and directed orders against the Indianapolis School Board. 332 F.Supp. 655 (1971) (Jt.A. p. A-157) That decision was affirmed on appeal, and this Court denied review. 474 F.2d 81 (7th Cir., 1973), *cert.den.* 407 U.S. 920. (Jt.A. p. A-119)

On September 14, 1971, a "Motion to Intervene as Party Plaintiffs" and a Complaint in Intervention (Jt.A. p. A-141 and p. A-143) were filed by Donny Brurell Buckley and Alycia Marquese Buckley (hereinafter referred to as the "Buckley Plaintiffs"), who purported to represent a class of Negro school age children in Marion County, Indiana, who attended the Indianapolis Public Schools. Numerous school corporations located both within and without Marion County, Indiana, were also joined as added Defendants, and on October 21, 1971, the Buckley Plaintiffs filed an Amended Complaint which named Edgar D. Whitcomb, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, and The Indiana State Board of Education, a private corporate body (hereinafter collectively referred to as the "State Defendants"), as added Defendants. (Jt.A. p. A-149) Jurisdiction under the Amended Complaint was extended to include *42 U.S.C., Secs. 1983 and 1988, 28 U.S.C., Secs. 1343(3), 2201 and 2202,* and the Fourteenth Amendment to the Constitution of the United States.

On February 2, 1973, The District Court issued an order setting the cause for trial, indicating that the issues to be litigated were those framed by the Buckley Plaintiffs'

Amended Complaint and the Answers filed thereto. (Jt.A. p. A-118) A trial was held on June 12, 1973, through July 6, 1973, and was reopened by the Court on its own motion on July 18, 1973. In that trial the parties were as follows:

1.
Indianapolis Public School System
Marion County, Indiana

IPS is one of eleven school systems located in Marion County, Indiana, and its 1972-73 enrollment exceeded 97,000 students and was characterized by a racial composition of 59% white and 41% black. At the time of trial it was the 29th largest school system in the United States. As stated before, IPS had already been found guilty of *de jure* segregation; however, before the commencement of the second trial, the District Court held that its findings in the first trial were *res judicata* for purposes of the second hearing. These prior findings included the placement and construction of three high school buildings by IPS in 1961, 1963 and 1967, which action was found to constitute *de jure* segregation for the reason that when the schools were opened they were attended predominantly by white students.

2.
State Officials

In the second trial, the State Defendants defended against the allegations contained in the Amended Complaint. No findings were entered against the Governor or the Attorney General, but findings were made against The Indiana State Board of Education and the Superintendent of Public Instruction. Specifically, those findings were that the prior findings against IPS in the first trial (the placement of three high schools constructed in 1961, 1963 and 1967) were imputed to state officials because there was the

power in The Indiana State Board of Education to review and approve site selections for purposes of insuring minimum health and safety standards.

3.

School Districts Within Marion County, Indiana

There are ten school systems located in Marion County, Indiana, in addition to IPS. Of those, eight are township schools and two are school systems for the City of Beech Grove, Indiana, and the Town of Speedway, Indiana. Their combined enrollment in 1972-73 was approximately 77,611. The geographical area served by these ten school systems has never been a part of IPS, and their existence, in many instances, dates back over 100 years in their present form or in the form of their respective predecessor schools.[4] At the conclusion of the second trial, the District Court found that these ten added school systems were not guilty of any acts of *de jure* segregation. 368 F.Supp. 1203. (Jt.A. p. A-54)

4.

Additional School Districts Outside Marion County, Indiana

There were ten school districts located outside Marion County, Indiana, in six other counties, which, in several instances, have existed since before the Civil War. Their combined 1972-73 enrollment was approximately 27,131 children. Like the ten systems located within Marion County, these systems, too, were found by the District Court not to be guilty of any acts of *de jure* segregation. 368 F.Supp. 1203. (Jt.A. p. A-54)

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4. See the answers of these school systems filed in response to the Buckley Plaintiffs' interrogatories.

The Findings and Orders in the District Court

The posture of the case at the conclusion of the second hearing, some 5½ years after the Complaint was filed by the United States, was as follows:

(1) IPS was guilty of *de jure* segregation (held *res judicata* at the second hearing);

(2) The Indiana State Board of Education and the Superintendent of Public Instruction were guilty of *de jure* segregation (based upon prior acts of IPS held *res judicata* at the second hearing, which were "imputed" to the State);

(3) Twenty separate and unrelated school systems were found to be operating constitutional, unitary school systems. Nevertheless, the District Court entered orders against IPS and all of the added defendants, including nineteen of the twenty unitary school systems. 368 F.Supp. 1208-1210. (Jt.A. p. A-67-70)

The District Court found that the desegregation of the Indianapolis Public Schools could not be permanently accomplished within its own boundaries, primarily because of the possibility of resegregation "within a matter of two or three years." The District Court recognized, however, that it would be possible to desegregate IPS within its own boundaries:

> "In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifiable as a black school. . . . This is not the Court's idea of a plan which 'promises realistically to work.'" 368 F.Supp. at 1198. (Jt.A. p. A-43-44)

Thus, the District Court, contrary to *Green v. County School Board of New Kent County, Virginia,* 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Ed-*

ucation, 402 U.S. 1 (1972), sought a desegregation plan under a rationale identical with that of the lower courts in *Milliken v. Bradley, supra,* rather than one which promised to work *now.* This theory was of course rejected in *Milliken v. Bradley, supra.*

To effectuate the degree of racial balance desired by the District Court for the *permanent* desegregation of IPS, it was found necessary to involve nineteen of the twenty independent, unitary school system defendants in the desegregation plan. To accomplish this, an inter-district desegregation remedy had to be justified.

The District Court was unpersuaded by the reasoning of the United States Court of Appeals for the Fourth Circuit in *Bradley v. School Board of City of Richmond, Virginia,* 462 F.2d 1058 (1972), affirmed by an equally divided Court, 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed. 2d 771 (1973), insofar as it related to the propriety of an inter-district remedy, but rather relied entirely upon the reasoning of the United States Court of Appeals for the Sixth Circuit in *Bradley v. Milliken, supra,* reversed and remanded, *Milliken v. Bradley, supra.* The District Court distinguished the State of Virginia from the State of Indiana on the theory that public education in Virginia was a *local* function, while in Indiana it was a *state* function, just as the Sixth Circuit found in *Bradley v. Milliken, supra.* The District Court then concluded that school district boundary lines could be summarily disregarded in Indiana, consistent with the Sixth Circuit's ruling in *Bradley v. Milliken, supra.* In this regard, the District Court stated:

> "In short, paraphrasing the holding of the Sixth Circuit in Bradley, et al. v. Milliken, et al., *supra,* this Court holds that the record establishes that the State has committed *de jure* acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a fed-

> eral court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of Brown II. Brown v. Board of Education, 349 U.S. 294, 300-01 (1955). In the instant case the only feasible desegregation plan involves the crossing of boundary lines between IPS and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. . . ." 368 F.Supp. at 1205. (Jt.A. p .A-59)

Having determined that it had the power to order an inter-district remedy, the District Court then entered orders against IPS and 19 of the 20 added school system defendants requiring the inter-district transfer of black students from IPS to each of the added school system defendants. 368 F.Supp. at 1209. (Jt.A. p. A-67) This order was subsequently stayed by oral order of August 8, 1973.

On December 6, 1973, the District Court filed a Supplemental Memorandum of Decision, 368 F.Supp. 1223 (Jt.A. p. A-83), wherein the court vacated its earlier order directing the inter-district transfer of students, giving the following reason for taking such action:

> "It should be understood, however, that the reason for this ruling is simply that it would be inconsistent to permit such orders to stand, although stayed, inasmuch as the General Assembly, in the exercise of its discretion, may desire to adopt an acceptable plan which would be inconsistent with such orders." 368 F.Supp. at 1231. (Jt.A. p. A-101)

The District Court also reiterated its earlier position in regard to the desegregation of IPS, by stating:

> "At this time the Court looks forward to a *permanent* solution to the problem of desegregating IPS, which will either come from the General Assembly, as it should, or from this Court in the event of legislative default." (Emphasis ours.) 368 F.Supp. at 1231. (Jt.A. p. A-101)

In large part, the remainder of the Supplemental Decision was directed to the Indiana General Assembly, with the court defining what it considered to be a "reasonable time" for the General Assembly to act, and what it considered to be "acceptable solutions" to the problems of IPS, which solutions included, but were not limited to, (1) abolishing IPS and approximately 23 other independent, unitary school systems located nearby, and thereafter consolidating these systems into either one "metropolitan school district," or combining them to form 6 or 8 metropolitan systems, or as an alternative, (2) permitting IPS and the neighboring school systems to remain in existence, but requiring each of them to participate in a statutory desegregation plan. 368 F.Supp. 1227. (Jt.A. p. A-93) The District Court emphasized what it conceived to be the power and duty of the General Assembly, or the court in the event of "legislative default," stating:

> "Put in other terms, local autonomy for such corporations (school corporations) is, under the law of Indiana, a privilege—not a right—all as discussed in detail in *Indianapolis II*. The consideration for permitting the various corporations to continue their separate existence might therefore be stated to be their participation in a meaningful plan to desegregate IPS." 368 F.Supp. at 1228. (Jt.A. p. A-94)

This then was the case as it pertained to the inter-district desegregation remedy which was appealed to the Court of Appeals as provided in 28 U.S.C. § 1292(b).

Interim Relief in the District Court

As interim relief, IPS was directed to transfer to each of the added Defendants, except Washington and Pike, a number of Negro students equal to 5% of the total 1972-73 enrollment of each transferee school respectively; to transfer to Washington 1% of its 1972-73 white enrollment and

to Pike 2% of its enrollment for the same school year.[5] 368 F.Supp. at 1209. (Jt.A. p. A-67) IPS was further directed to rearrange enrollment patterns in its elementary schools so that each school would have a minimum black enrollment in the area of 15% for the 1973-74 school year; feeder patterns for high schools were to be rearranged so as to secure a black enrollment in each school which would approach their numbers in the entire system. 368 F.Supp. at 1209-10. (Jt.A. p. A-68-69)

On August 8, 1973, when the District Court orally stayed that portion of the Order for Interim Relief which required the inter-district transfer of pupils from IPS to the added school system Defendants, it denied a stay of the portion of the order which required intra-city busing for IPS. Instead, IPS was given one week to prepare and submit an interim desegregation plan for the City of Indianapolis, which was to be implemented for the 1973-74 school year consistent with the court's guidelines set forth in its July 20, 1973, Memorandum of Decision.

The prior intra-city plan which contemplated transporting nearly 5,000 Negro students to the suburbs was necessarily abandoned, and preparations for the new plan were immediately undertaken. IPS submitted its new plan to the District Court, and sought a partial stay or modification of the July 20 order, as modified on August 8, 1973.

A hearing on this motion took place on August 20, 1973. At that hearing, IPS sought the following modifications:

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5. "Washington" and "Pike," referred to above by the District Court, are the Metropolitan School Districts of Washington and Pike Townships, two independent township school systems located in Marion County. Both systems have a significant Negro enrollment in their schools at the present time, and, for that reason, fewer Negro students from IPS were required to fulfill the District Court's arbitrary quota. See, 368 F. Supp. at 1209, wherein the District Court also praises Washington for its "exemplary record of fair treatment of its minority students. . . .". (Jt.A. p. A-67)

(1) to eliminate the reassignment of high school students for the 1973-74 school year, and

(2) to require that 36 (rather than 52) elementary schools be brought up to a 15% black enrollment for the 1973-74 school year.[6]

Among the reasons given for these requests were the lack of time remaining before the first day of school (two weeks), the severe hardship on the high school students reassigned (established athletic teams, school loyalties, cheerleaders, elected officers for student council, class president, etc.), the lack of adequate transportation facilities to effect the court contemplated reassignments, and the need for future flexibility due to the court's insistence on inter-district involvement, coupled with the administration's desire to avoid second and third student reassignments, if possible. All of the testimony relating to this evidence was uncontradicted.

The court denied the application for stay or modification, held the IPS plan unacceptable, found the Indianapolis School Board in "default" for submitting an unacceptable plan, appointed a two-man commission to devise and implement a desegregation plan, and assigned the entire professional planning staff of IPS to the exclusive service and control of the court-appointed commission. Order of August 27, *nunc pro tunc* to August 20, 1973 (Jt.A. p. A-104)

At the hearing of August 20, there was no evidence presented which indicated that IPS had insufficient local funds

6. There were 52 elementary schools in IPS which had a black student enrollment of less than 15%, and it was to those schools that the court's order was specifically directed. It must be recognized that to accomplish the court's directives, many more schools had to be involved in the plan. The plan submitted by IPS proposed the reassignment of 4632 students, and at the August 20, 1973, hearing the administrative staff of IPS testified that this was the maximum effort that could reasonably be expected to be accomplished for the beginning of the 1973-74 school year. (Transcript of August 20, 1973, hearing, pp. 21, 49, 53 and 79).

to maintain any and all programs necessary to the successful implementation of a desegregation program; nor was there any evidence that IPS had failed to apply for federal funds to assist in such programs as part of a scheme to discriminate against black students. In fact, this was not even an issue. Nevertheless, at the conclusion of the hearing, IPS was directed by the court to apply for all available federal funds to assist in desegregation. Order of August 27, *nunc pro tunc* to August 20, 1973. (Jt.A. p. A-104)

The Court-appointed Commissioners submitted their plan to the Court, and on August 30, 1973, it was approved. Order of August 30, 1973 (Jt.A. p. A-111). The Court-appointed Commissioners' plan was similar to the IPS plan in that it did not involve the high schools. The major distinction between the Commissioners' plan and the IPS plan was that the Commissioners' plan bused approximately twice as many students. In fact, the amount of busing required by the Commissioners' plan was so great that the plan could not be implemented for the reason that there were insufficient transportation facilities available. Therefore, the Commissioners' plan had to be implemented over the months of September, October, November, and into December, at which time the Court-appointed Commissioners were discharged. In reward for their efforts, the Commissioners received over $40,000 from IPS, pursuant to an order of the District Court; Otis R. Bowen, Governor of the State of Indiana, and a party defendant in this action, earns $36,000 per year.

All parties to the proceedings in the District Court appealed to the Court of Appeals except the Buckley Plaintiffs. The District Court's finding that the suburban school defendants had committed no acts of de jure segregation was uncontested on appeal.

The Case in the Court of Appeals

The Court of Appeals affirmed the District Court's ruling that the Indianapolis School Board was in default of its constitutional obligations because it submitted an unacceptable plan, citing *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 28 L.Ed. 2d 554, 91 S.Ct. 1267 (1971), thereby equating the act of submitting an "unacceptable" plan with an act of refusing to submit any plan at all. — F.2d —. (Jt.A. p. A-15) The portion of the order requiring the appointment of the Commission and assigning the entire planning staff to the exclusive service and control of the Commission was also affirmed, the Court citing *Bradley v. Milliken,* 484 F.2d 215, 252 (6th Cir., 1973). The order requiring the Indianapolis School Board to apply for all available federal funds was affirmed with Court ultimately relying upon *Swann v. Charlotte-Mecklenburg Board of Education, supra,* wherein the following language is contained:

> "A remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." 402 U.S. at 28,

which was quoted by the Court of Appeals, — F.2d at —. (Jt.A. p. A-16)

The Court of Appeals upheld the District Court's finding that none of the suburban school system Defendants had committed acts of *de jure* segregation, and, because of this finding, it reversed the District Court insofar as it had ordered the suburban school systems located outside of Marion County to participate in an inter-district desegregation remedy, citing *Milliken v. Bradley, supra.* However, the Court disregarded the significance of that finding when

it failed to reverse the inter-district order in its entirety Instead, the Court merely vacated the order as it pertained to the school systems located within Marion County, and remanded the case for further proceedings to determine whether Uni-Gov was unconstitutional due to the fact that it did not provide for extending the boundaries of IPS to points coterminous with those of Uni-Gov.[7] — F.2d at —. (Jt.A. p. A-33)

The District Court expressly abstained from determining the Uni-Gov question in its entirety. 368 F.Supp. at 1208. (Jt.A. p. A-65) The District Court deemed it unnecessary, which is absolutely correct. What the Court of Appeals has overlooked is that the Uni-Gov question, *as it relates to the propriety of an inter-district desegregation remedy, has already been decided.* IPS was the only school system held to be *de jure* segregated; it was specifically found that only IPS had discriminated against black students within its system *in favor of white students within its system.* 332 F.Supp. 655. (Jt.A. p. A-157) On the other hand, the other independent school systems located within Marion County are unitary in nature, and the District Court so found. Thus, whatever *effect* Uni-Gov has had, it is patently clear that Uni-Gov has not caused segregation in any school system located outside of IPS. Under *Milliken v. Bradley, supra,* the remedy should be limited to IPS: the ten suburban school systems located within Marion County should be dismissed from the case, and, IPS should be allowed to

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7. Uni-Gov has already withstood one challenge to its constitutionality. *Bryant v. Whitcomb,* Cause No. IP 69-C-115 (S.D. Ind., 1970), an unreported opinion, reprinted at Jt.A. p. A-277. One statute in the Uni-Gov Act, *I.C. (1971), 18-4-3-14,* excludes school systems from the provisions of the Uni-Gov, but, of course, under the law of Indiana, local school systems and municipal civil governments are entirely separate entities. See p. 21, *infra.* Furthermore, this issue was raised in the Buckley Plaintiffs' Amended Complaint (Jt.A. p. A-140), and it was fully litigated in the District Court.

retain its identity without further threat of unconstitutional judicial dissolution.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court of Appeals Has Decided An Important Question of Federal Law In Conflict With Applicable Decisions of This Court.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court held:

> "School authorities are traditionally charged with broad power to formulate and implement education policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to White students reflecting the proportion for the district as a whole. To do this as an educational policy, is within the broad discretionary powers of the school authorities; *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.* As with any equity case, the nature of the violation determines the scope of the remedy." (Emphasis ours) 402 U.S. at 16.

This Court recently reaffirmed this fundamental principle in *Milliken v. Bradley, supra,* stating:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." 41 L.Ed.2d at 1091.

It was the above principle of law which led this Court to reverse the decision of the Court of Appeals of the Sixth Circuit in *Bradley v. Milliken, supra,* for the reason that the de jure segregated conditions which were found in that case existed only in the Detroit school system; there was no

finding that any of the suburban school systems situated near Detroit had committed any acts of *de jure* segregation, and for those reasons an inter-district desegregation remedy was held to be improper.

In the present case, there were three essential findings made by the District Court which place this case squarely within this Court's decision in *Milliken v. Bradley, supra.* Those findings were:

1. IPS was found to be a *de jure* segregated school system as of August 18, 1971. 332 F.Supp. 655. (Jt.A. p. A-157)

2. The State Defendants were found to have committed acts which contributed to segregation within IPS by imputation, and were thus found guilty of *de jure* segregation (specifically these acts were the approval of the location of three high schools within the boundaries of IPS in the years 1961, 1963 and 1967, respectively). 368 F.Supp. 1205. (Jt.A. p. A-58) Throughout the case, IPS was not permitted to contest the finding against it for the reason that it was *res judicata;* the State Defendants were never permitted to contest the imputed IPS findings against them, which were affirmed by the Court of Appeals, in spite of this Court's recent decision in *Milliken, supra,* involving similar action of a much greater magnitude by state officials in Michigan.

3. Nineteen added-defendant school systems situated within and without Marion County were found innocent of any constitutional violations in regard to the maintenance of their respective school systems. The third essential finding, the innocence of nineteen added-defendant suburban school systems, *was not disputed by any party* on appeal. The Court of Appeals affirmed the first two findings in all respects, but the third finding, one of the few truly undisputed findings in the entire case, was affirmed in part and ignored in part. That finding was the basis for the Court's

reversal of the District Court's inter-district desegregation order insofar as it pertained to the school systems located outside of Marion County consistent with the rule enounced by this Court in *Milliken v. Bradley, supra;* that finding was disregarded insofar as the inter-district order pertained to the school systems located within Marion County, the Court thereby avoiding the mandate of *Milliken v. Bradley, supra.* It is submitted that a finding of fact cannot be affirmed as to some parties and disregarded as to others; especially is this true when the finding is equally supported by evidence as to all parties for which it was made and where its validity was *challenged by no party* on appeal.

The finding that *all* added suburban school Defendants were innocent of *de jure* segregation is controlling in this case; this is true regardless of the outcome of the proceedings for which this case has been remanded to the District Court. As stated before, the Court of Appeals has deemed it necessary for the District Court to now determine whether or not the school boundaries of IPS should have been extended by the Uni-Gov Act of 1969 to points coterminous with the boundaries of certain functions of local government, an action which would have abolished the ten independent suburban school systems located in Marion County, Indiana. The Court of Appeals apparently reasons that if the lines had been extended, then a desegregation plan involving all of Marion County would be appropriate. This is clearly error, because the Court of Appeals has totally disregarded or ignored the significance of the finding of fact in favor of the suburban school Defendants located within Marion County in light of two recent decisions by this Court, namely, *Milliken v. Bradley, supra,* and *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973).

Before elaborating upon the significance of *Milliken v. Bradley, supra,* and *Keyes v. School District No. 1, Denver,*

Colorado, supra, Uni-Gov is deserving of brief comment. First, it must be recognized that prior to the passage of Uni-Gov in 1969, indeed, nearly three quarters of a century ago, The Board of School Commissioners of the City of Indianapolis was considered to be a *separate entity* from the Indianapolis civil government under the Constitution of the State of Indiana. *Campbell v. City of Indianapolis,* 155 Ind. 186, 57 N.E. 920 (1900). And, of course, the passage of Uni-Gov did nothing to alter this independence. Secondly, the separation of civil boundaries and school boundaries in Indiana has been judicially approved as necessary to meet the educational needs of a modern urban society, where school problems differ significantly from civic and social problems. *Fort Wayne Community Schools v. New Haven Public Schools,* 240 Ind. 57, 61, 159 N.E. 2d 708 (1959). In 1967, some two years prior to the passage of Uni-Gov, 61% of the students in Indiana were educated in school systems, the boundaries of which were not coterminous with those of civil units of government; by 1972, the number of students so educated has risen to 72.2%.[8] Thus, Uni-Gov's failure to make them coterminous resulted in a situation which is common throughout the State of Indiana, as well as other states.[9] Thirdly, the situation necessitating the passage of Uni-Gov can be easily understood. When the urban areas in Indiana outgrew the city boundaries, as they did in Indianapolis,[10] it resulted in extensive duplication, confusion and overlapping of powers (*i.e.,* county v. towns within the county v. cities within the county). Civil governments were unable to meet, or even define, their governmental responsibilities which were es-

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8. See, Exhibits "V" and "W" offered by the Metropolitan School District of Lawrence Township, and Exhibit "D" offered by the Metropolitan School District of Wayne Township.

9. See, *Wright v. Council, City of Emporia,* 407 U.S. 451 (1972).

10. See, Exhibits "EE," "FF," and "GG" offered by the Metropolitan School District of Wayne Township.

sentially county-wide, and certainly more than city-wide, in nature. The purpose of Uni-Gov was to eliminate or alleviate those problems.

The purpose of Uni-Gov should not be seriously questioned. Uni-Gov has already withstood a challenge to its constitutionality. *Bryant v. Whitcomb, supra.* (Jt.A. p. A-277) The Indiana General Assembly, in 1971, passed a similar Act applicable to Vanderburgh County, Indiana, and, consistent with Uni-Gov, the school systems were expressly excluded. *I.C. 18-4.5-5-9* (Jt.A. p. A-276).

However, Petitioners are aware that in *Wright v. Council, City of Emporia,* 407 U.S. 451 (1972), this Court held:

> "The existence of a permissible *purpose* cannot sustain an action that has an impermissible *effect.*" (Emphasis ours) 407 U.S. at 462.

Therefore, what was the *effect* of Uni-Gov upon IPS? As noted before, Uni-Gov expressly excluded the school systems located in Marion County from its operation; it also excluded the Airport Authority, the Health and Hospital Corporation, the County Department of Welfare, the Building Authority, and the Library Districts, to name a few. See, *I.C. (1971), 18-4-3-14.* Simply stated, the effect of Uni-Gov was that it failed to *affect* IPS in any way. Therefore, Uni-Gov satisfies the narrow test enounced in *Wright v. Emporia, supra,* and its validity must be upheld.

It is for this reason that further proceedings in the District Court are absolutely unnecessary; under *Milliken v. Bradley, supra,* an inter-district desegregation remedy is improper where there has been no inter-district violation, and where the District Court has already determined that no constitutional violations have been committed by the added-school Defendants located in Marion County, *it is without jurisdiction to proceed further* against them. In *Swann v. Charlotte-Mecklenburg Board of Education, supra,* this Court held:

> "Judicial powers may be exercised *only* on the basis of a constitutional violation." (Emphasis ours) 402 U.S. at 16.

Thus, by ignoring the finding of fact (no constitutional violation) in favor of the ten added school Defendants in Marion County, the Court of Appeals not only avoids the mandate of *Milliken v. Bradley, supra,* but it also permits the District Court to again exercise its jurisdiction over those added-defendants where none exists under *Swann, supra.*

The opinion of the Court of Appeals does not disclose why the Court believes the existence of Uni-Gov to be relevant. Petitioners can only conclude that the Court of Appeals, by permitting the District Court to contemplate a Marion County-wide remedy, has overlooked the significance of this Court's decision in *Keyes v. School District No. 1, Denver, Colorado, supra.* This point can be clearly demonstrated by assuming, *arguendo,* that Uni-Gov should have extended the boundaries of IPS to points coterminous with those of Uni-Gov. For purposes of the assumed argument, we will name the "new" school district the "Marion County Consolidated School District." The question then becomes: "Having found *de jure* segregation extant solely within the boundaries of 'old' IPS, would a District Court *automatically* have the power to impose a desegregation remedy involving the entire newly created 'Marion County Consolidated School District?' " The answer to this question is clearly in the negative.

In *Keyes, supra,* this Court remanded the case to the District Court after determining that the power to involve the whole system does not arise automatically. Rather, in a huge, single school district, such as Denver, Colorado, such power will arise only if it cannot be shown that the other parts of the single system were not involved in acts of *de jure* segregation, so to constitute separate, identifiable and unrelated units.

In the instant case, the ten school systems located outside of IPS but within Marion County, are certainly separate, identifiable and unrelated units; furthermore, they have already been subjected to the hearing for which *Keyes* was remanded, and the District Court has already found, after the *Keyes* decision, that these individual systems were not guilty of *de jure* segregation. Therefore, the Marion County-wide remedy which the Court of Appeals has decided to permit the District Court to contemplate, cannot be imposed *unless the finding of fact in favor of the ten suburban school districts continues to be ignored.*

In conclusion, the decision of the Court of Appeals contravenes three recent decisions of this Court: *Milliken v. Bradley, supra, Keyes v. School District Number One, Denver, Colorado, supra,* and *Swann v. Charlotte-Mecklenburg Board of Education, supra.* It has done so by disregarding an uncontested finding of fact, the existence of which should operate to limit the power of a federal court in a desegregation case to proceed against unitary school systems. The portion of the District Court's order requiring the interdistrict transportation of pupils between IPS and the 19 suburban school systems should have been reversed in its entirety. IPS has lived under the threat of federal judicial dissolution for over three years; findings have been made which are determinative as to whether IPS should be permitted to continue its existence. Those findings should be upheld, and the Indianapolis School Board, with its administrative staff, should be allowed to devote its *full* attention to the educational needs of the children attending school within IPS.

II.

Certiorari Should Be Granted Because The Court of Appeals Has Decided An Important Question of Constitutional Law Which Has Not Been, But Should Be, Settled By This Court.

The Tenth Amendment of the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973), this Court stated:

> "Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. at 35.

The Indiana General Assembly, pursuant to Article VIII, Section 1, of the Indiana Constitution, has provided for a general and uniform system of schools, by statutorily creating numerous local political subdivisions, each of which is a local school district operating on an independent basis, both financially and administratively. See, *Robinson v. Schenck*, 102 Ind. 307, 1 N.E. 698 (1885). Clearly, the people of the State of Indiana control education in this state, and regardless of how the powers have been allocated between state officials and local governments, any attempt by the federal government to exercise direct control over public education in the State of Indiana, without the consent of state and local authorities, should constitute a violation of the Tenth Amendment of the Constitution of the United States.

At the conclusion of the August 20, 1973, hearing, The Indianapolis School Board was ordered by the District

Court to apply for all available funds to assist in desegregation. (Jt.A. p. A-110) At that hearing there was no evidence presented which indicated that the Indianapolis School Board had refused to apply for federal funds as part of a scheme or plan to impede the desegregation of IPS; there was no evidence which indicated that federal funds were necessary, and there was no evidence that the Indianapolis School Board had insufficient local funds available to maintain any program necessary to the desegregation of IPS. In fact, at that hearing, there was no contention that any of the propositions set forth above even existed, *and the District Court made no findings to that effect.* The Court merely noted that federal funds were available, and thereafter summarily ordered the Indianapolis School Board to apply for them. It is respectfully submitted that the order of the District Court was without basis in fact and in law, and therefore constitutes a federal intrusion upon local governmental powers in contravention of the Tenth Amendment of the Constitution of the United States.

On appeal, the Court of Appeals affirmed the validity of this order, relying in part on the decision of the United States Court of Appeals for the Fifth Circuit in *Plaquemines Parish School Board v. United States,* 415 F.2d 817 (5th Cir., 1969), where the court, in reversing an order *identical* to that complained of in the present case, stated what it believed to be an exception to the rule:

> "This direction is without prejudice to the right of the District Court in the future in a specific situation as to specific funds to require that application be made when it is shown that the Board has failed to apply for such funds as part of a plan or scheme to impede the end of a dual system of schools, or to discriminate against Negro children." 415 F.2d at 833.

The reliance by the Court upon the language contained in *Plaquemines* is *incredible* because, as stated before, there was absolutely no contention that the situation discussed in *Plaquemines* existed in regard to IPS, there was no evidence presented to that effect and there was absolutely no finding to that effect. The *Plaquemines* decision stands for the proposition that a federal court cannot summarily order a local school board to apply for federal funds; the *dicta* which was lifted from the *Plaquemines* decision and relied upon by the Court of Appeals in the present case, describes an exception to the rule, which is inapplicable to the evidence in this case, inapplicable to the findings in this case, and is therefore inapplicable to the law of this case. By affirming the order of the District Court, the Court of Appeals has contravened the very decision it based its reliance upon.

The Court of Appeals ultimately relied upon this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* wherein this Court noted that during the process of dismantling a dual school system some "bizarre" situations may result (Jt.A. p. A-16). It is respectfully submitted that this Court's language in *Swann, supra,* does not stand for the proposition that a School Board sheds its constitutional rights at the courthouse step in a school desegregation case.

Federal aid to IPS will result in a relinquishment of local control to the federal government. The federal government will control the expenditure of that money and the programs instituted with those funds will be subject to federal guidelines. Thus, the District Court's order not only brings about a federal intrusion upon local fiscal policy, it also disturbs local administrative policies. This Court has recognized the importance of the *source* of funding for public education. In *San Antonio Independent School District v. Rodriquez, supra,* this Court stated:

> "The people of Texas may be justified in believing that other systems of school finance, which place more of the financial responsibility in the hands of the state, will result in a comparable lessening of the desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies." 411 U.S. at 51-52.

Of course, the same proposition applies with even greater force when viewed in the context of federal funds and increased federal control over the fiscal policies of local school systems.

In cases such as this, the federal intrusion upon local governmental powers is not limited to interference with fiscal policies, nor is it limited to the control that the federal government will be permitted to exercise over the expenditures of the funds obtained and the educational programs maintained therewith. There are significant "side effects" which go hand-in-hand with federal aid to public education. A good example of this can be seen in recent federal legislation, P. L. 93-380, passed August 21, 1974. Under these two educational amendments, entitled "Protection of the Rights and Privacy of Parents and Students," and "Protection of Pupil Rights,"[11] respectively, schools receiving federal aid are required to strictly observe numerous requirements, including but not limited to, procedures regulating the maintenance of student records and the disclosure of the contents of said records.

The issue before this Court does not involve a dispute as to whether federal aid to education is desirable from an educational standpoint; indeed, that is one of the most controversial subjects discussed by educators throughout the nation today. Rather, this case involves the constitutional right of duly elected local school officials to *choose* between

11. 20 U. S. C. §§ 1232(g) and (h).

local funding and federal funding for the maintenance and operation of a local school system. If the decision of the Court of Appeals is allowed to stand, the constitutional rights of the Indianapolis School Board will have been judically repealed, and the court's decision will serve as precedent for the abolishment of similar rights presently reserved to other forms of local government with the ultimate result that the Tenth Amendment to the Constitution of the United States will have been judically repealed in its entirety.

III.

Certiorari Should Be Granted Because The Court of Appeals Has Decided An Important Question of Federal Law In Conflict With An Applicable Decision of This Court.

In *Swann v. Charlotte-Mecklenburg Board of Education, supra,* this Court held:

> "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." 402 U.S. at 16.

In *Swann, supra,* numerous plans had been submitted to the District Court proposing various methods for desegregating that school system. Many of the plans were rejected by the Court, and, in the final analysis, only 3 of those plans were found "acceptable." The District Court thereafter ordered the school board to adopt one of the 3 acceptable plans, or in the alternative, to come forward with a new, equally effective plan of its own. In response to the court's directive, the school board refused to do anything, rather it merely "acquiesced" in one of the plans found acceptable by the court which was already in effect. Thereafter, the district court directed that the acceptable plan

already in effect would remain so. This Court justified the action taken by the district court for the reason that the school board was in *default* of its constitutional obligation to desegregate its school system. *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 16-17.

In the present case, the Indianapolis School Board was found in default of its constitutional obligation to desegregate the Indianapolis Public Schools, the court relying entirely upon the *Swann, supra,* decision. However, the Indianapolis School Board was not found in default because of its *refusal* to offer acceptable solutions to the desegregation of IPS, rather it was found in default for its *inability* to comply with the District Court's order.

The uncontested facts pertaining to this issue are: On August 8, 1973, when the District Court orally stayed that portion of the order which required the transportation of some 5,000 black students from IPS to the suburbs, it directed IPS to come forward with a plan that would meet the court's directives contained in its Memorandum of Decision of July 20, 1973. This necessarily meant that much of the previous plan which had been prepared with the view that 5,000 students were to be transported out of IPS, had to be abandoned. IPS was given one week to comply with this order, which it did. However, IPS asked for a partial stay or modification of the court's directives, giving numerous reasons

This matter was heard by the District Court on August 20, 1973. The plan submitted by the Indianapolis School Board, prepared by its administrative staff, proposed that there should be no reassignment of high school students for the 1973-74 school year. It further proposed to bring 36 out of 52 predominately white schools within IPS to a minimum black enrollment of 15%.[12] At the hearing, IPS

12. The court's order directed that high school students be reassigned and that all 52 predominately white elementary schools be brought up to a minimum black enrollment of 15%

offered numerous reasons in support of its plan and request for partial stay or modification. Those reasons included the lack of time remaining before the first day of school (2 weeks), the severe hardship on the high school students reassigned due to established school loyalties, athletic teams, cheerleaders, etc., the lack of adequate transportation facilities available, and the need for future flexibility due to the forthcoming inter-district involvement which was contemplated by the District Court. This testimony was uncontradicted. The reasons given by IPS could then best be summed up by stating that IPS believed that strict compliance with the court's July 20, 1973, order was unreasonable from an educational standpoint, unreasonable from an administrative standpoint, and most importantly, it was *impossible* from a practical standpoint *because it simply could not be accomplished by September 4, 1973,* the first day of school.

The court rejected the uncontradicted testimony of the administrative staff of IPS, held the IPS plan unacceptable, found the Indianapolis School Board in default for submitting it, appointed a two man commission to replace the Indianapolis School Board giving the commission full authority and responsibility to devise and implement an interim and final desegregation plan, and assigned the entire professional planning staff of IPS to the exclusive service and control of the court-appointed commission. The court claimed authority for its action in *Swann v. Charlotte-Mecklenburg Board of Education, supra.*

The Indianapolis School Board did not *refuse* to obey the order of the District Court. At the hearing, the administrative staff testified that the court's orders could not be carried out by the commencement of school due to the lack of time remaining and the insufficient transportation facilities available. This testimony was uncontradicted. The court could have modified its order and permitted IPS to

implement a more comprehensive plan at a later date, but it did not do this. Instead, it found the Indianapolis School Board in default for the reason that it was unable to comply with its order and appointed commissioners who were also unable to comply with such order.

Even assuming that there was some reason for the court to disbelieve the uncontradicted testimony of the administrative staff (which might be some justification for its ruling), there was absolutely no justification for the order to remain in effect after August 30, 1973, when the court-appointed commission came to the District Court and advised it that the July 20, 1973, order could not be complied with due to the lack of time and the inadequacy of transportation facilities available. On August 30, the District Court even accepted the earlier recommendation that high school students not be reassigned; which was a recommendation based strictly upon sound educational policy rather than upon the absolute inability to do it. Simply stated, the plan found "acceptable" to the court in no way resembled the plan which IPS was directed to prepare and implement. The Commissioners' plan could not be implemented in its entirety for approximately 3½ months, while the plan requested by the District Court and submitted by IPS, was to be implemented on September 4, 1973, the first day of school.

The Court of Appeals affirmed the District Court in all respects, citing *Swann, supra.* [The Court of Appeals attempted to bolster its decision by characterizing the IPS plan as the *only* effort put forth by the Indianapolis School Board to desegregate its schools since the District Court's decision in 1971. (Jt.A. p. A-14) Such an observation is contrary to the factual history of this case.] First, *prior* to the hearing of August 20, 1973, the Indianapolis School Board had reassigned well over 7,000 students within its system in an effort to desegregate its schools. The plan

submitted by the Board which was the subject of the August 20, 1973, hearing proposed the reassignment of another 4,600 students. This latter plan was prepared upon extremely short notice, and submitted with the sincere statement that nothing more could be accomplished by the beginning of the 1973-74 school year. To say the Indianapolis School Board has done nothing is incredible. Moreover, the District Court, from August 18, 1971, through July 20, 1973, repeatedly stated that IPS *could not be desegregated within its own boundaries*, 332 F. Supp. at 678; 368 F. Supp. at 1198. (Jt.A. p. A-203 and p. A-43-44), which left petitioners somewhat confused as to what the court wanted.

Prior to July 20, 1973, the Indianapolis School Board had successfully carried out every order of the District Court which, up to that time, had required the reassignment of over 7,000 pupils. On July 20, 1973, the District Court issued an order (modified on August 8, 1973) with which the Indianapolis School Board could not fully comply. For its inability to comply, it has been condemned, found to have acted in bad faith, held in default, replaced for some 3½ months by a court-appointed commission, and been required to pay over $60,000 in salaries, expenses and attorneys fees for the court-appointed commission. The courts below have justified this action as necessary and consistent with *Swann v. Charlotte-Mecklenburg Board of Education, supra.*

The factual situation found in *Swann, supra,* which justified the exercise of judicial power over a local school system does not even remotely resemble the factual situation in the present case. For example, the School Board in *Swann* was first ordered to submit a desegregation plan in April of 1969. Numerous plans were submitted and it was not until August 7, 1970, after the School Board *refused* to adopt an "acceptable" plan, or submit further

plans, that the District Court entered its order. Thus, the School Board in *Swann* had some 15 or 16 months to prepare a suitable plan. In contrast, the Indianapolis School Board was given one week to submit a plan. The Indianapolis School Board did not refuse to act, it was simply unable to fully comply with the court's arbitrary quotas on such short notice. Further, the Indianapolis School Board was not permitted to concern itself with educational principles, such as the inadvisability of the reassignment of high school students on short notice (although this recommendation gained the court's favor when the Commissioners submitted their plan some ten days later). It is respectfully submitted that the action taken by the District Court in this case was not justified by *Swann v. Charlotte-Mecklenburg Board of Education, supra,* and in fact, the orders of the District Court constitute a violation of that decision wherein this Court placed limitations upon the exercise of judicial powers over educational matters. The District Court has disregarded and therefore abused those limitations.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

OTIS R. BOWEN, as Governor of the State of Indiana, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, et al., *Respondents.*	No. _____
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, et al., *Respondents.*	No. _____
THE SCHOOL TOWN OF SPEEDWAY, INDIANA, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, et al., *Respondents.*	No. _____

JOINT APPENDIX OF PETITIONERS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1974

OTIS R. BOWEN, as Governor of the State of Indiana, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, et al., *Respondents.*	No. _____
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, et al., *Respondents.*	No. _____
THE SCHOOL TOWN OF SPEEDWAY, INDIANA, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, et al., *Respondents.*	No. _____

JOINT APPENDIX OF PETITIONERS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 73-1968 through 73-1984
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, et al.,
Intervening Plaintiffs-Appellees,

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 68-C-225

S. HUGH DILLIN
Judge.

ARGUED FEBRUARY 20, 1974 — DECIDED AUGUST 21, 1974

Before SWYGERT, *Chief Judge,* KILEY, *Senior Circuit Judge,* and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* This is a school desegregation case originally brought by the United States against the Board of School Commissioners of Indianapolis, Indiana, but later expanded to include as defendants school districts located in the surrounding metropolitan area. These 17 separate appeals raise a host of divergent issues.

I

THE BACKGROUND

The United States initiated this action on May 31, 1968, pursuant to section 407(a) and (b) of Title IV of the Civil

Rights Act of 1964 (42 U.S.C. § 2000c-6(a) and (b)). The complaint charged the Board of School Commissioners for the City of Indianapolis with racial discrimination in the assignment of faculty and students.

The faculty portion of the charge was resolved first. On August 5, 1968, the district court concluded (pursuant to stipulation by the parties that racial factors had been considered in the assignment of teachers and staff members) that racial composition of faculty and staff deprived students of equal protection in violation of the Fourteenth Amendment. The court entered a consent decree ordering remedial injunctive relief commencing with the school year of 1968-69. Faculty and staff desegregation is one "important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Board of Education,* 395 U.S. 225, 232 (1969).

Public school teachers in Indianapolis then brought a class action in an Indiana state court and obtained a temporary restraining order to prevent transfers of teachers and staff without the consent of the teachers involved. Defendant school board and its members removed the case to the federal district court, which promptly dissolved the restraining order. *Burns v. Board of School Commissioners,* 302 F. Supp. 309 (S.D. Ind. 1969), *aff'd,* 437 F.2d 1143 (7th Cir. 1971).

The student portion of the 1968 case was tried before the court on July 12-21, 1971. In accordance with *Brown v. Board of Education (Brown I),* 347 U.S. 483 (1954), the court found that the Indianapolis school board was deliberately operating a *de jure* dual school system on May 17, 1954 (the date of *Brown I),* and had not changed its policies in order to eliminate *de jure* segregation on

or before May 31, 1968 (the date of the government's complaint). Pursuant to *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955), the court on August 18, 1971 ordered interim relief, retained jurisdiction to order further relief and directed the school board to file plans of affirmative action for the school year 1971-72 as required by *Green v. County School Board*, 391 U.S. 403, 437-38 (1968). ("School boards . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.") *United States v. Board of School Commissioners (Indianapolis I)*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

In *Indianapolis I*, the court concluded that the common law of Indiana was that the boundaries of a school district and of a civil city were coterminous, a rule finally recognized by statute in 1931.[1] Statutes passed in 1961[2] and in 1969[3] provided that, if Indianapolis' boundaries were extended, those of its school district could likewise be expanded. Such expansion, however, would be subject to a separate remonstrance or veto by a specified percentage of persons affected.

In 1969, after this suit had been commenced, the civil governments of the City of Indianapolis and of Marion County were consolidated into a unified, metropolitan city government by the so-called Uni-Gov Act, which expressly

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[1] Acts 1931, Ch. 94, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1948 Repl.), I.C. 1971, 20-3-11-1.

[2] Acts 1961, Ch. 186, §§ 1, 9, 10; Burns Ind. Stat. Ann. §§ 28-2338, 28-2346, 28-2347 (1968 Cum. Supp.), I.C. 1971, 20-3-14-1, 20-3-14-10.

[3] Acts 1969, Ch. 52, § 3, p. 57; Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.), I.C. 1971, 20-3-14-9.

provides that the Indianapolis school district would not be affected by the expansion of the city.[4] In other words, the school district (or School City) of Indianapolis was confined to an area in the central part of the new Uni-Gov, where it is surrounded by eight township school systems and by two additional city school corporations (Beech Grove and Speedway City), all operating independently within the new unified City of Indianapolis and within Marion County.

The district court concluded that "the easy way out . . . would be to order a massive 'fruit basket' scrambling of students within the School City," but "it won't work." Resegregation would rapidly occur because of a white exodus from what would be substantially black schools. The resegregation problem "would pale into insignificance if the [school] Board's jurisdiction were coterminous with that of Uni-Gov" and "would be minimized still further if extended to . . . Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis. . . ." The court ordered the United States as plaintiff to join as additional parties defendant the municipal corporations and school corporations which would have an interest in the court's intended consideration of the entire metropolitan area. 332 F. Supp. at 678-80.

On September 7, 1971, the United States moved to add as parties defendant all school corporations in Marion County (eight townships and two city corporations). A few days later, the court permitted the Buckley plaintiffs (Donny Brurell Buckley and Alycia Marquese Buckley by their parents and next friend, Ruby L. Buckley) to inter-

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[4] Acts 1969, Ch. 173, § 314, p. 357; Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), I.C. 1971, 18-4-3-14.

vene in their own right and as representatives of a class consisting of "all Negro school age children residing in the area served by" the Indianapolis school board. The intervening plaintiffs, in turn, joined as additional parties defendant the Governor and Attorney General of Indiana, the state Superintendent of Public Instruction, the state Board of Education and 19 school corporations (including the ten within Marion County which had been joined by the United States, plus nine in the adjoining counties of Boone, Hamilton, Hancock, Johnson, Morgan and Hendricks).

Citizens of Indianapolis for Quality Schools, Inc., a not-for-profit corporation, was permitted to intervene as a defendant. *See United States v. Board of School Commissioners,* 466 F.2d 573 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973). Coalition for Integrated Education, an unincorporated association favoring a metropolitan plan of desegregation, was granted leave to file briefs as *amicus curiae* in both the district court and in this court.

The intervening plaintiffs filed an amended complaint in intervention in two counts. The first count alleged that the Indiana statutes effecting a governmental reorganization in Indianapolis were unconstitutional as racially discriminatory because schools were excluded from the consolidated metropolitan government, and prayed for an order consolidating the defendant school systems. The second count alleged and sought relief from racial discrimination by the state and local school authorities in the operation of the public schools of Indianapolis and the surrounding school corporations.

The additional defendants filed various motions attacking their joinder, the complaint in intervention and the court's jurisdiction on a variety of grounds. All these mo-

tions were overruled by the district court. Several of the added defendants subsequently applied unsuccessfully to this court for writs of prohibition or mandamus to vacate the joinder and intervention orders;[5] to compel the convening of a three-judge district court;[6] and to compel the recusation of the district judge.[7]

On September 28, 1972, the court for the first time ordered the development and submission of comprehensive plans for the desegregation of the Indianapolis district.[8] In response, the Indianapolis board on February 8, 1973 submitted a plan, denominated the "Stabilization Plan." The "Stabilization Plan" was subsequently rejected by the court on June 11, 1973.

The remedy phase *(Indianapolis II)* was tried before the court from June 12 to July 6 and July 18, 1973. On July 20, 1973, the court entered its decision, concluding that (1) desegregation promising a reasonable degree of permanence could not be accomplished within the present boundaries of the Indianapolis school district; (2) the State of Indiana, its officials and agencies, had by various acts

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[5] This court ruled on three such applications: *Avon Community School Corp.* v. *Dillin*, No. 71-1695 (Sept. 27, 1971); *Carmel-Clay Schools* v. *Dillin*, No. 71-1702 (Oct. 1, 1971); and *School Town of Speedway* v. *Dillin*, No. 72-1063 (Feb. 2, 1972), *cert. denied*, 407 U.S. 920 (1972).

[6] *Metropolitan School District* v. *Dillin*, No. 73-1101 (Apr. 2, 1973), *cert. denied*, 412 U.S. 953 (1973).

[7] *Sendak* v. *Dillin*, No. 73-1144 (Feb. 22, 1973), cert. denied, 412 U.S. 949 (1973); a motion for stay of a June 11, 1973 trial date pending the ruling on the petition for a writ of certiorari was denied by this court on May 23, 1973 and by the Supreme Court at 412 U.S. 937 (1973).

[8] A study of the school system, with iterim recommendations for desegregation, was prepared at the request of the board by a team of representatives from the Office of Education, Department of Health, Education and Welfare. Its recommendations were rejected by the board on June 17, 1969. *See United States* v. *Board of School Commissioners*, 332 F. Supp. 655, 670-71 (S.D. Ind. 1971). A federally funded study by two "advisory specialists" employed by the school board resulted in a series of desegregation recommendations which were also rejected shortly before trial in 1971. *See* 332 F. Supp. at 672.

and omissions promoted segregation and inhibited desegregation within the Indianapolis district, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has a continuing affirmative duty to desegregate the Indianapolis system; (3) the system could be effectively desegregated either by combining its territory with all or part of the territory served by the 19 surrounding school corporations in and adjacent to Marion County into a metropolitan system and then reassigning students within the expanded system or by transferring black students from the Indianapolis district to the 19 others, either on a one-way or exchange basis; and (4) the state, through its General Assembly, should first be afforded the opportunity to select its own plan; but if it failed to do so, the court would promulgate a plan. The court ordered interim relief in the form of student assignments for the 1973-74 school year sufficient to bring the number of black students in each Indianapolis elementary school up to approximately 15 percent, which was accomplished.[9] *United States v. Board of School Commissioners (Indianapolis II)*, 368 F. Supp. 1191 (S.D. Ind. 1973).

Meanwhile, the Indiana General Assembly was organized in November, 1973 for a session to begin in January, 1974. On December 6, 1973, the court issued a supplemental

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[9] On August 20, 1973, an additional hearing was conducted, after which the court ruled that a plan submitted by the Indianapolis board failed to comply with the iterim relief order and that circumstances justified the appointment, as officers of the court, of a two-man commission to accomplish the task. On August 30, 1973, a plan formulated by the commissioners was approved. Applications by the Indianapolis board for a stay of implementation of the orders entered on August 20 and 30 were denied by this court. Misc. No. 73-8170 (Sept. 10, 1973), and by a Justice of the Supreme Court, *Board of School Commissioners v. United States*, No. A-278 (Sept. 14 and Sept. 21, 1973) (Rehnquist, J.). The plan has now been implemented. The commissioners were discharged on December 10, 1973.

memorandum of decision, consisting principally of suggestions and recommendations for the General Assembly to implement *Indianapolis II* with an affirmative plan. *United States v. Board of School Commissioners (Indianapolis III)*, 368 F. Supp. 1223 (S.D. Ind. 1973).

The General Assembly held its scheduled session. The only legislation it passed relating to this case was Senate Enrolled Act No. 119, which was signed into law by the Governor of Indiana on February 20, 1974. The statute provides for the adjustment of tuition among transferor and transferee schools and for the reimbursement of transportation costs by the state and is rigidly limited in its application:

> This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the transferor corporation; and (c) the Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such Amendment. This chapter shall not apply until all appeals from such order, whether taken by the transferor corporation, any transferee corporation or any party to the action, have been exhausted or the time for taking such appeals has expired, except where all stays of a transfer order pending appeal or further court action have been denied.

II

INTERIM RELIEF WITHIN THE INDIANAPOLIS PUBLC SCHOOL SYSTEM

In *Indianapolis II*, the district court directed the Indianapolis public school system (which the court referred to as IPS) to rearrange the enrollment patterns in its elementary schools, effective with the 1973-74 school year, so that each school would have a minimum black enrollment "in the area of 15%." IPS was directed to pair or cluster schools in close proximity and to realign school assignment zones in order to expand the neighborhood or community school concept and to reduce the necessity for busing. If, after utilizing these procedures, certain schools did not meet the required percentages of black enrollment, pairing or clustering of schools in noncontiguous zones would be required. 368 F. Supp. at 1209.

The unanimous Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 27 (1971), discussed these precise remedies and concluded that, even if paired or grouped zones for transferring blacks out of and whites into formerly segregated black schools were "on opposite ends of the city," nevertheless "[a]s an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court."

In response to *Indianapolis II*, IPS submitted a plan which proposed to close four predominantly black schools and to distribute the displaced students to white schools with excess unused capacity. After an evidentiary hearing on August 20, 1973 on the IPS plan, the district court found on August 27 that it (1) did not readjust the percentage of minority students in the elementary schools to approximately 15 percent; (2) did not provide for

reducing the percentage of minority students at Shortridge High School nor for increasing the percentage of minority students at Thomas Carr Howe High School, as previously ordered; and (3) did not provide for the use of any of the attendance zone, pairing or clustering devices required by the court. The court, concluding that "the Board is unable or unwilling to comply with the orders of this court," appointed a two-man commission to develop desegregation plans, temporarily assigned the IPS planning staff to assist the commissioners, and required that application be made for available federal funds to assist in desegregation.[10]

The Board of School Commissioners of IPS in the present appeal attacks the district court's order insofar as it (1) held the board in default; (2) appointed the two-man commission to prepare plans of desegregation; (3) assigned the professional planning staff of IPS to the temporary service of the commission; and (4) ordered IPS to apply for all available federal funds.

IPS alleges that the commission's plan for interim relief, which reassigned some 9,200 students as opposed to the IPS plan reassigning approximately 4,500 students, "in large part was copied from the earlier [IPS] plan." IPS Brief, p. 27.

We fail to perceive how desegregation and dismantlement of the IPS dual school system would be advanced by discarding the court's interim plan, which has been in effect for an entire school year, and by substituting

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[10] In an order entered on August 27, 1973, and expanded by an order denying stay entered December 18, 1973, the court ordered the Indianapolis board to apply "for Federal funds in all of the various categories available to school systems operating under orders of desegregation."

a similar plan that goes only half as far as the adopted plan in achieving desegregation.

"The measure of any desegregation plan is its effectiveness." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971). "[A] school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation." *Green v. County School Board*, 391 U.S. 430, 439 (1968).

Here the court's interim plan, although concededly only a temporary measure, was at least twice as effective as the rejected IPS plan.

The percentage of nonwhite enrollment in IPS grew from 18.9 percent in 1950 to 26 percent in 1960 and to 35.9 percent in 1970. At the time of trial, the percentage of black enrollment was 41.1 percent. The IPS interim plan affected 30 of the approximately 100 elementary schools and brought nonwhite enrollment to approximately 15 percent in each school. The commission (court-adopted) interim plan affected significantly 61 elementary schools and tended to bring both predominantly white and black schools closer to 41 percent black enrollment per school.

The 1972 enrollment, the IPS-planned enrollment for 1973 and the commission-planned enrollment for 1973 compare as follows (N.C. refers to "no change" and— indicates a discontinued school):

School	Percentage Non-White Enrollment 1972	IPS	Comm.	School	Percentage Non-White Enrollment 1972	IPS	Comm.
1	98.6	N.C.	N.C.	37	99.0	N.C.	34.9
2	23.7	N.C.	21.5	38	94.2	N.C.	35.0
3	0.7	14.5	27.5	39	4.2	15.1	20.1
4	99.5	—	39.8	40	—	—	—
5	47.7	N.C.	N.C.	41	99.6	N.C.	N.C.
6	—	—	—	42	100.0	N.C.	N.C.
7	38.8	N.C.	N.C.	43	99.8	N.C.	N.C.
8	1.7	N.C.	15.2	44	99.6	N.C.	N.C.
9	32.1	N.C.	—	45	98.4	N.C.	N.C.
10	—	—	—	46	8.9	15.0	24.7
11	40.7	N.C.	N.C.	47	0.0	15.0	24.8
12	30.7	N.C.	20.8	48	100.0	N.C.	N.C.
13	—	—	—	49	5.4	15.0	24.7
14	6.9	15.2	15.1	50	0.0	N.C.	31.0
15	0.6	N.C.	27.5	51	88.2	N.C.	39.9
16	11.8	16.1	—	52	77.2	N.C.	31.0
17	—	—	—	53	44.9	N.C.	N.C.
18	0.7	N.C.	19.2	54	0.0	N.C.	22.0
19	3.8	15.0	20.4	55	14.7	N.C.	N.C.
20	11.8	15.0	20.1	56	100.0	N.C.	N.C.
21	9.9	15.0	20.2	57	5.0	15.0	23.1
22	9.1	15.0	15.0	58	0.6	15.0	23.2
23	—	—	—	59	18.7	N.C.	N.C.
24	—	—	—	60	100.0	N.C.	N.C.
25	—	—	—	61	1.9	15.0	19.9
26	93.0	N.C.	38.0	62	1.6	N.C.	15.3
27	86.5	N.C.	N.C.	63	99.7	N.C.	N.C.
28	3.0	15.0	20.4	64	99.4	N.C.	37.9
29	100.0	—	—	65	4.2	N.C.	19.7
30	0.7	15.0	30.8	66	95.1	—	N.C.
31	0.0	N.C.	19.1	67	36.6	N.C.	31.6
32	94.1	—	—	68	0.3	N.C.	18.02
33	7.7	15.1	27.4	69	99.2	N.C.	38.0
34	0.6	14.9	19.6	70	41.0	N.C.	34.7
35	0.0	N.C.	19.2	71	96.7	N.C.	N.C.
36	100.0	N.C.	—	72	20.1	N.C.	N.C.

School	Percentage Non-White Enrollment 1972	IPS	Comm.	School	Percentage Non-White Enrollment 1972	IPS	Comm.
73	81.9	N.C.	84.72	94	0.6	15.0	25.7
74	23.2	N.C.	N.C.	95	1.7	N.C.	22.4
75	84.6	N.C.	N.C.	96	0.8	15.1	16.4
76	99.7	N.C.	N.C.	97	25.4	N.C.	N.C.
77	1.2	N.C.	23.0	98	0.2	14.5	19.8
78	0.0	15.0	22.1	99	39.7	N.C.	N.C.
79	0.4	15.0	20.0	100	4.4	15.1	15.1
80	13.0	N.C.	N.C.	101	36.2	N.C.	N.C.
81	2.5	N.C.	20.0	102	1.2	15.0	19.9
82	0.0	N.C.	20.2	103	3.3	N.C.	19.8
83	63.1	N.C.	N.C.	104	45.8	N.C.	22.4
84	6.8	15.0	15.2	105	0.4	15.0	19.8
85	12.7	N.C.	N.C.	106	24.0	N.C.	N.C.
86	53.2	N.C.	N.C.	107	6.1	15.1	21.5
87	100.0	N.C.	29.9	108	1.8	N.C.	17.7
88	0.5	N.C.	15.8	109	0.9	N.C.	19.8
89	3.7	N.C.	18.89	110	99.2	N.C.	N.C.
90	8.0	15.1	15.0	111	37.3	N.C.	34.3
91	18.7	N.C.	N.C.	112	68.2	N.C.	38.0
92	4.0	N.C.	23.18	113	6.5	15.0	25.7
93	1.0	N.C.	25.7	114	52.5	N.C.	34.0

The district court properly rejected the IPS plan, which, two years after the finding of *de jure* segregation by IPS, went a relatively short distance toward desegregation. "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green v. County School Board, supra* at 439.

Faced with a totally unacceptable plan a few days before the beginning of the 1973-74 school term, the court turned to two independent commissioners to preform a herculean task within aminiscule period of time. The court said "in sorrow and with regret" that "never, since this thing

started on the complaint of the United States in 1968 . . . has any [IPS] Board . . . gone very far to do anything, really, unless they were pushed and ordered" and then "when they were ordered, they usually . . . come up with an alternative idea that doesn't go quite as far as the order, or you want a stay or something—anything to put it off.'"

In appointing the two commissioners to formulate a plan, the district court followed the procedure approved in *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 16, 25:

> In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.
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> • • •
>
> It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger [a court-appointed expert] was designated to assist the District Court to do what the board should have done.

The commission adhered to the district court's guidelines as approved in *Swann* by altering attendance zones, by contiguous and non-contiguous pairing and clustering, by "ungerrymandering" and by creating larger "neighborhood schools." The commission presented its recommended plan, entitled "The Quest for Human Dignity" within ten days of its appointment. This could not have been accomplished without the temporary use of the IPS planning staff. If in fact the commission made use of planning staff material, it obviously made much more effective use of that material than IPS had done.

We conclude that the district court acted properly in rejecting the IPS plan, in holding the IPS board in default,

in appointing the commission and in temporarily assigning the planning staff of IPS to the commission.[11]

Finally, in regard to the IPS board's attacks on the district court's orders, we hold that the court did not abuse its discretion in ordering IPS to seek available federal funds to expedite desegregation. This method of implementation of a decree intended to eliminate a dual school system has been approved by several courts. *United States v. Texas*, 342 F. Supp. 24, 29 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972); *Whittenberg v. Greenville County School Dist.*, 298 F. Supp. 784, 790 (D. S.C. 1969) (three-judge panel). In *Plaquemines Parish School Board v. United States*, 415 F.2d 817, 833 (5th Cir. 1969), the court of appeals found a "broadly written" order requiring application for federal aid unjustified, but added:

> This direction is without prejudice to the right of the district court in the future in a specific situation as to specific funds to require that application be made when it is shown that the board has failed to apply for such funds as part of a plan or scheme to impede the end of the dual system of schools, or to discriminate against Negro children.

In the last analysis, we must look to *Swann*, where the Supreme Court said (402 U.S. at 28):

> The remedy for such [*de jure*] segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

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[11] *See Bradley* v. *Milliken*, 484 F.2d 215, 252 (6th Cir.), *vacated on other grounds*, ... U.S. . . . . (July 25, 1974): "[T]he defendants and school districts involved will continue to supply administrative and staff assistance to the [court-appointed] panel upon its request."

We believe that in this case the district court properly requested the defendants to seek federal funds.

III

RACIAL BALANCE WITHIN THE METROPOLITAN INDIANAPOLIS AREA

Even the Board of School Commissioners of IPS concedes that "it appears clear from the cases heretofore decided by the Supreme Court of the United States that the . . . obligation imposed by the Constitution of the United States upon IPS is the duty to dismantle the dual school system which was found to exist within its present boundaries." Brief, pp. 12-13.

The district court's opposition to a final desegregation plan within IPS was on the basis that "in the long haul, it won't work." 332 F. Supp. at 678. The court's theory was restated in *Indianapolis II* (368 F. Supp. at 1197):

> [T]he Court in its original opinion expressed some doubts as to whether or not a stable desegregation plan could be established within the confines of IPS, based upon the evidence adduced at that trial, which was all to the effect that when the percentage of Negro pupils in a given school approaches 40%, more or less, the exodus of white pupils from such school becomes accelerated and irreversible, resulting in resegregation. However, additional evidence on the issue was adduced at the recent trial, and the Court bases its findings exclusively upon such latter evidence.
>
> Having considered such evidence, the Court finds it to be a fact that when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues. . . . All witnesses agreed that once a school becomes identifiably black, it never reverses to white,

> in the absence of redistricting. Therefore, progressions from white to black are irreversible once the critical percentage has been reached in the absence of intervention through redistricting. Below the critical percentage, however, schools tend to remain stable . . .

The district court then concluded that the most effective method of realistically accomplishing desegregation of IPS would be either by combining IPS territory with that of all or part of the territory served by the ten Marion County (Uni-Gov) school districts and possibly also with that of some or all of the nine school districts in counties adjacent to Marion County, and then reassigning students within the metropolitan area thus created, or by transferring black students from IPS to the other districts, either on a one-way or an exchange basis.

Having found IPS guilty of *de jure* segregation, the court then proceeded to consider upon evidentiary hearing the situation in the remaining school districts. He concluded (368 F. Supp. at 1203):

> There was no evidence that any of the added defendant school corporations have committed acts of de jure segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none. . . .

In *Milliken v. Bradley*, . . . US. . . . (July 25, 1974), where the lower courts had found a *de jure* segregated public school system in operation in Detroit (*Bradley v.*

Milliken, 338 F. Supp. 582, 594 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215, 258 (6th Cir. 1973)), but with "no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect," the majority of the Supreme Court said:

> To approve the remedy ordered by the court would impose on the outlying districts, not to have committed any constitutional violation, a wholly impermissible remedy....
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> • • •
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> Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on the record the remedy must be limited to that system.

The Supreme Court further concluded that, even if state agencies participated in the maintenance of the Detroit system, as the lower courts had held, it did not follow that an interdistrict remedy would be constitutionally justified or required.

In the present case, based upon the district court's comprehensive and detailed recital of the history of Indiana law and procedure pertaining to Indiana schools, appearing in 332 F. Supp. at 658-77 and in 368 F. Supp. at 1199-1205, we conclude, as the district court did, that the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries (see Part IV hereof).

On the other hand, the district court's findings, rulings, orders and discussion relating to a metropolitan remedy beyond the Uni-Gov boundaries are reversed. Those relat-

ing to a metropolitan remedy within Uni-Gov are vacated and remanded (see last section of this opinion).

IV

DISMANTLING THE DUAL SYSTEM WITHIN THE INDIANAPOLIS PUBLIC SCHOOLS

So-called "white flight" is not an acceptable reason for failing to dismantle a dual school system. "[It cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual school system." *United States v. Scotland Neck City Board of Education,* 407 U.S. 484, 491 (1970). *See also Monroe v. Board of Commissioners,* 391 U.S. 450, 459 (1968).

Where system-wide dualism has been found, as here, ". . . [the] School Board has the affirmative duty to desegregate the entire system 'root and branch,'" and "the District Court must . . . decree all-out desegregation . . ." *Keyes v. School District No. 1,* 413 U.S. 189, 213, 214 (1973). We must guard against permitting the "white flight" considerations unduly to delay complete desegregation within IPS now that *Milliken v. Bradley* has disposed of the metropolitan remedy.

Subsequent to oral argument in these appeals, the record has been supplemented to include an order entered by the district court on July 3, 1974, whereby IPS has been directed to continue for the 1974-75 school year the interim plan in effect for the 1973-74 school year, except that feeder assignments to Thomas Carr Howe High School are to be arranged "to insure that the freshman class at such school for the coming school year will include a minority race enrollment of not less than 15%."

Obviously many steps have been taken to dismantle the IPS dual school system within its boundaries, but more steps must be taken. The Supreme Court's mandate to us to develop a plan of desegregation that "promises realistically to work *now*" *(Green v. County School Board,* 391 U.S. at 439), requires us to remand the case "for further proceedings consistent with [*Milliken v. Bradley*] leading to prompt formulation of a decree directed to eliminating the segregation found to exist" within IPS.

V

MISCELLANEOUS ISSUES ON APPEAL

Recusation of District Judge. The state officials (Governor, Attorney General, State Superintendent of Public Instruction and State Board of Education) moved to recuse the district judge by filing an affidavit of alleged personal bias or prejudice under 28 U.S.C. § 144. The affidavit stated that on December 27, 1972 the judge submitted to an interview which was published in six weekly newspapers and which allegedly evinced an attitude of prejudgment on the liability of the state officials.

The portion of the interview to which the state officials objected read as follows:

> The judge explained that he had involved the city's peripheral districts in the suit because the racial imbalance that is seen in the schools of the Indianapolis Public Schools system exists because of housing patterns in the city.

In *Indianapolis I,* which had been decided 16 months prior to the interview, the judge had found after hearing that "[l]ow-rent housing projects within the School City

have significantly affected the racial composition of the schools." 332 F. Supp. at 673.[12]

"The remarks were derived from proceedings had before the court, and not on attitudes or conceptions that were formed outside the courtroom, so as to constitute disqualifying personal bias or prejudice." *Hanger v. United States*, 398 F.2d 91, 101 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969).

Furthermore, comments, rulings or questions propounded to witnesses by the judge during the subsequent trial in which the state officials participated as defendants, and views expressed concerning the applicable law during that trial, do not establish personal bias or prejudice. Nor did the state officials file any subsequent affidavit covering trial events.[13] We have examined the record and have found that the judge was necessarily firm at times, particularly when it appeared that the defendants were foot-dragging and stalling, but never did he exhibit personal bias or prejudice, nor go beyond the bounds of an ordinary and reasonable trier of fact attempting to solve a difficult and lengthy school desegration case.

Adding Parties-Defendant While Appeal Pending. The state officials argue that IPS appealed from *Indianapolis I* on September 10, 1971 and that everything that transpired in the district court between that date and February 1, 1973, when this court affirmed *Indianapolis I* (474 F.2d 81), is null and void. They point particularly to the addi-

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[12] *See also* 332 F. Supp. at 676: "[R]esegregation rapidly occurs, and the entire central core of the involved city develops into a virtually all-Negro city within a city when, as in Indianapolis, the Negro residential area is largely confined to a portion of the central city in the first place."

[13] 28 U.S.C. § 144 provides that "[a] party may file only one such affidavit in any case," but it also provides that the affidavit "*shall* state the facts and the reasons for the belief that bias or prejudice exists."

tion of state officials as parties-defendant on September 14, 1971, the filing of the amended complaint and complaint in intervention and the trial of *Indianapolis II*.

We disposed of this contention in an earlier appeal in this case, *United States v. Board of School Commissioners*, No. 72-1948 (Aug. 10, 1973), where we said (p. 3):[14]

> . . . Defendants also contend that all jurisdiction passed from the district court when the notice to appeal was filed.
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> Certainly the district court had the power to enforce its earlier order while the appeal was pending. The Fifth Circuit addressed defendants' jurisdictional contention in *Plaquemines Parish Commission Council v. United States*, 416 F.2d 952, 954 (5th Cir. 1969):
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> > "The district court did not lose jurisdiction of the parties merely because an appeal was pending from the desegregation order. Appellants cite no school case authority to support their view that the district court lacks jurisdiction to promulgate additional orders to maintain the status quo and to insure the enforcement of its previous orders. Generally, a district court retains jurisdiction to enforce its prior orders, and this is particularly true with respect to desegregation cases. United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932); Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II); Green v. School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968)."

Eieventh Amendment. The state officials and one of the Marion County defendants, Perry Township, con-

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[14] The prior appeal was disposed of by an unpublished order, which under our Circuit Rule 28 "shall not be cited as precedent . . . except to support a claim of . . . law of the case." That is the reason for citing it here.

tended that the Eleventh Amendment[15] bars prosecution of an action "in essence against the State of Indiana[16] without the State's consent or waiver of consent."

In *Scheuer v. Rhodes,* —— U.S. ——, 42 U.S.L.W. 4543, 4545 (Apr. 17, 1974), Mr. Chief Justice Burger said for a unanimous court (Mr. Justice Douglas took no part):

> However, since *Ex parte Young,* 209 U.S. 123 (1907), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he
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> > "comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. 209 U.S., at 159-160. (Emphasis supplied.)"

In *Cooper v. Aaron,* 358 U.S. 1, 4, 19-20 (1958), the Supreme Court said:

> As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim

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[15] The Eleventh Amendment to the Constitution of the United States provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of any foreign State." The Eleventh Amendment applies to suits against a state by citizens of that state. *Fitts* v. *McGhee,* 172 U.S. 516 (1899).

[16] The amendment bars suits not only against the state when it is named a party but when it is the party in fact. *Edelman* v. *Jordan,* .... U.S. ...., 42 U.S.L.W. 4419 (Mar. 25, 1974).

> by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*, 347 U.S. 483.
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> • • •
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> The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedom guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

The Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment, which commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Res Judicata. Several of the school boards outside of IPS territory contend that they were deprived of due process of law by the district court's decision to make a portion of its prior holding in *Indianapolis I res judicata,* although these other school boards had not become parties to the litigation until after *Indianapolis I* had been decided.

On June 11, 1973, the court ruled that its previous judgment "to the effect that the School City of Indianapolis maintains a school system which is segregated by operation of law is *res judicata* . . ." In *Indianapolis II* the judge reiterated what part of *Indianapolis I* he considered binding on the parties. He said that the issue "that IPS was unlawfully segregating the public schools within its boundaries" was *res judicata.* This issue had been vigorously

fought by IPS in the district court and had been affirmed by this court after equally spirited opposition by IPS here. *United States v. Board of School Commissioners*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

In *Indianapolis II*, the district court did "not consider its conclusions in [regard to metropolitan desegregation] as res judicata." 368 F. Supp. at 1195.

The outside school boards made no attempt to attack the issue of *de jure* segregation within IPS. In fact most of them, as well as the state officials, have argued in this appeal that IPS should be desegregated within its own boundaries.

In *Bradley v. Milliken*, 338 F. Supp. 582, 594 (E.D. Mich. 1971), the district court found a *de jure* segregated public school system in operation in the City of Detroit. The Court of Appeals for the Sixth Circuit, after noting that the 53 school districts outside of Detroit which the district court included in the desegregation area should be made parties and be given an opportunity to be heard, added that "the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling . . . reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on the 'Detroit-only plans of desegregation. . . ." 484 F.2d 215, 252, *reversed on other grounds, Milliken v. Bradley*, —— P.S. —— July 25, 1974).

This is precisely what the district court did in the Indianapolis case. We hold that its rulings in this regard were proper.

Three-Judge Court. The school boards outside IPS contend that the district court violated Indiana statutes by

purporting to order the transfer of school children from IPS to outside school districts without seeking to convene a three-judge court under 28 U.S.C. § 2281.

The district judge found that the Indiana statutes alleged to have been violated applied only to school corporations within Marion County, Indiana, and he therefore denied the motion for a three-judge court on the ground that the statutes were not of the requisite general, statewide application. *Griffin v. County School Board,* 377 U.S. 218, 227-28 (1964).

This court denied a petition by the school boards for a writ of mandamus or prohibition and aodpted the district court's memorandum of disposition of the three-judge question in *Metropolitan School District v. Dillin,* No. 73-1101 (Apr. 2, 1973), and certiorari was denied at 412 U.S. 953 (1973).

In the Detroit school case, the Sixth Circuit denied applications for writs of mandamus or prohibition against the district judge for "failing to convene three-judge courts . . . in spite of the fact that . . . [certain school] Districts were not parties to the desegregation proceedings and had not been found to have committed any act of de jure segregation." *Bradley v. Milliken,* 484 F.2d 215, 217-18 (6th Cir. 1973). The Supreme Court denied certiorari in the Detroit mandamus and prohibition cases at 410 U.S. 954 (1973).

Exclusion of Sociological Evidence. The outside school boards appealed the court's exclusion of the testimony of two expert sociological witnesses. Dr. David J. Armor would have testified that "mandatory busing programs could result in adverse sociological and psychological effects on the children involved . . . . that prejudice, racial

identity, solidarity and desire for separatism was usually enhanced rather than diminished, and that over the short run busing for purposes of integration did not lead to significant gains in student achievement or interracial harmony."[17] Dr. Earnest van den Haag would have testified: "(a) Contact between the races does not reduce prejudice; and (b) Integration (as distinguished from desegregation) may heighten racial identity and reduces the opportunity for actual contact between the races."[18]

In *Brown I, Brown v. Board of Education,* 347 U.S. 483 (1954), Mr. Chief Justice Warren buttressed his conclusion that the "separate but equal" doctrine of *Plessy v. Ferguson,* 163 U.S. 537 (1896), deprived minority children of equal educational opportunities, with a footnote citing some sociological and psychological authority to that effect. 347 U.S. at 494 n. 11. This reliance on supportive sociological material by the Supreme Court has led to a number of abortive attempts to overrule *Brown* and reinstate *Plessy* through reliance on sociological and psychological material which purports to show that minority children thrive when segregated. Needless to say, these attempts have all failed.

In *Mapp v. Board of Education,* the district court approved and implemented a plan of desegregation for the Chattanooga, Tennessee public schools at 329 F. Supp. 1374 (E.D. Tenn. 1971), and 341 F. Supp. 193 (1972). The majority opinion of a three-judge panel remanded the case to the district court for further consideration, particularly of recent sociological findings, in evaluating the impact of

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[17] *See also* Armor, "The Evidence on Busing," PUB. INTEREST 91 (Summer 1972).

[18] *See also* van den Haag, "Social Science Testimony in the Desegregation Cases," 6 VILL. L. REV. 69 (1960); van den Haag, "The Tortured Search for the Cause of Inequality," NAT. REV., Feb. 16, 1973, at 200.

induced busing upon educational achievement and race relations. Cause No. 71-2006 (6th Cir., Oct. 11, 1972). Judge Edwards dissented on the basis that any reevaluation of the sociological underpinnings of *Brown* was improper and misleading, and that counterevidence was available in any event.[19] Describing the majority's reference to Armor's article as "completely irrelevant to our legal problems," he appended to his dissent another article criticizing it. On December 14, 1972, the panel opinion was withdrawn and the case heard en banc. On April 30, 1973, the Sixth Circuit decided eight-to-two to affirm the district court in *Mapp v. Board of Education*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973).

In *Northcross v. Board of Education*, 466 F.2d 890, 894 (6th Cir. 1972), the court said:

> . . . In short, the School Board argues, busing for the purposes of desegregation "is wrong."
>
> The Supreme Court has, of course, come to the opposite conclusion in a recent unanimous decision, holding that "bus transportation" is one "tool of desegregation" which school authorities may be required to use. *Swann, supra*, 402 U.S. 1, 30, 91 S.Ct. 1267. Recognizing this to be the holding of *Swann*, Defendants nevertheless suggest that we come to a contrary conclusion on the basis of a single piece of much criticized sociological research, the conclusions of which are, by its own terms, inapplicable to the Southern school pattern. It would be presumptuous in the extreme for us to refuse to follow a Supreme Court decision on the basis of such meager evidence. *Swann* is controlling and requires us to sanction the use of bus transportation as a tool of desegregation when, as here, such busing is necessary to accomplish

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[19] Note, "Busing as a Judicial Remedy: A Socio-Legal Reappraisal," 6 IND. L. REV. 710, 736-38 (1973).

the dismantling of the dual system and its use does not pose intolerable practical problems.

The "much criticized sociological research" is Armor's article cited *supra* in footnote 17[20] and criticized in Judge Edwards' dissent in the original *Mapp* decision.[21]

In *Stell v. Savannah-Chatham County Board of Education*, 220 F. Supp. 667, 673 (S.D. Ga. 1963), the district court as early as 1963 relied upon a great volume of sociological and psychological material, including the testimony of Dr. van den Haag, in refusing to dismantle a dual school system. The Court of Appeals for the Fifth Circuit promptly entered an injunction requiring desegregation pending appeal on the merits at 318 F.2d 425 (5th Cir. 1963) and reversed the district court at 333 F.2d 55 (5th Cir.), *cert denied*, 379 U.S. 933 (1964).

If this sort of sociological and psychological material were fully valid and if *Brown I* vitally depended upon it, even then only the Supreme Court itself could overrule *Brown*.

But, as we have seen, the validity of the material is in grave doubt and *Brown* is not dependent upon it. As Judge Sobeloff so aptly put it in *Brunson v. Board of Trustees*, 429 F.2d 820, 824, 826 (4th Cir. 1970) (Judge Sobeloff con-

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[20] "It was agreed among all parties and the court below that Dr. Armor would have testified at the trial to the facts and conclusions stated in such article . . . ." Brief for Carmel-Clay Schools, et al. in the present case at 42.

[21] Armor's article is also criticized in: Editorial, "Dangerous Orthodoxy," N.Y. Times, July 5, 1972, at 38, cols. 1-2; Farber, "Lawyers' Group Fears an Overreliance on Educational Studies," N.Y. Times, June 11, 1972, at 37, cols. 1-5; Hodgson, "Do Schools Make a Difference," ATLANTIC, Mar. 1973, at 40-41; Pettigrew, Useem, Normand, & Smith, "Busing: A Review of "The Evidence," PUB. INTEREST, Winter 1973, at 88; Pettigrew, Useem, Normand, & Smith, "Pierced Armor," INTEGRATED EDUC., Nov.-Dec. 1972, at 3; Reinhold, "Study Critical of Busing Scored," N.Y. Times, June 8, 1972, at 40, cols. 1-3; Strickman, "The Trouble with Armor," 6 URBAN REV., Sept.-Oct. 1972, at 20.

curring and responding to a dissent which relied in part upon the sociological theories of Dr. Thomas F. Pettigrew):

> . . . There have always been those who believed that segregation of the races in the schools was sound educational policy, but since *Brown* their reasoning has not been permitted to withstand the constitutional command.
>
> • • •
>
> This idea, then, is no more than a resurrection of the axiom of black inferiority as justification for separation of the races, and no less than a return to the spirit of *Dred Scott*. The inventors and proponents of this theory grossly misapprehend the philosophical basis for desegregation. It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not, as Pettigrew suggests, because black children will be improved by association with their betters. Certainly it is hoped that under integration members of each race will benefit from unfettered contact with their peers. But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly.

The district court in *Indianapolis* was acting well within its discretion in excluding the testimony of Drs. Armor and van den Haag since neither the district court nor this court can overrule *Brown*.

Attorneys' Fees. The district court's decision in *Indianapolis II* included a finding that "attorneys for intervening plaintiffs and their class . . . are entitled to recover their reasonable attorneys fees and expenses, and intervening plaintiffs are entitled to recover their costs." 368 F. Supp. at 1210.

In *Norcross v. Board of Education,* 412 U.S. 427, 428 (1973), the Supreme Court held that under section 178 of Title VII of the Emergency School Aid Act, 20 U.S.C. § 1617, "the successful plaintiff [in a school desegregation case] 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' "

Section 718 did not become effective until July 1, 1972, whereas the intervening plaintiffs became parties to the case on September 14, 1971. However, in *Bradley v. School Board,*..... U.S..... (42 U.S.L.W. 4703, 4711, May 15, 1974), the Supreme Court held that "the District Court in its discretion may allow petitioners a reasonable attorneys' fee for services rendered" prior to July 1, 1972.

Section 718 provides in part that in a school desegregation case "the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

It is our understanding from the record that the district court has not awarded any specific fees to the intervening plaintiffs' attorneys; the court has the discretion to do so if the attorneys' services fall within the limitations set forth in section 718. Particularly, the court will be required to determine whether the intervening plaintiffs are "the prevailing party" under all the circumstances. We express no opinion on this issue inasmuch as the solution involves the intimate knowledge of this lengthy proceeding possessed only by the district court, whose discretion is called for by the statute.

In accordance with *Milliken v. Bradley,*..... U.S..... (July 25, 1974), we reverse the district court's findings,

conclusions, orders and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries; insofar as they pertain to a remedy within the boundaries of Uni-Gov, we vacate those rulings and remand for further proceedings consistent with that decision. The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries[22] warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*.[23]

In all other respects, the findings, conclusions, orders and rulings of the district court are affirmed and the case is remanded for a prompt formulation of a decree directed to eliminating the segregation found to exist in IPS schools.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[22] In *Milliken* v. *Bradley*, ... U.S. . . . (July 25, 1974), "The boundaries of the Detroit School District, . . . are coterminous with the boundaries of the city of Detroit, . . . established over a century ago by neutral legislation when the city was incorporated . . . ."

[23] "Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." . . . . U.S. at . . . . . *Cf.* Mr. Justice Stewart's concurring opinion: "Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . . ; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate."

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 3, 1974.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA and DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, et al., *Plaintiff-Appellee and Intervening Plaintiffs-Appellees,*	
Nos. 73-1968 thru 73-1984	On Petition for Rehearing.
vs.	
BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants-Appellants.*	

On consideration of the three petitions for rehearing filed in the above-entitled causes,

IT IS HEREBY ORDERED that the three petitions for rehearing in the above-entitled appeals be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* DONNY BRURELL BUCKLEY, et al., *Intervening Plaintiffs,* v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	No. IP 68-C-225

July 20, 1973.

As Corrected Nov. 12, 1973.

Supplemental Opinion Dec. 6, 1973.

MEMORANDUM OF DECISION

DILLIN, District Judge.

I.

Introduction

This is a school desegregation action originally brought by the United States on May 31, 1968, pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000c-6(a) and (b) against The Board of School Commissioners of Indianapolis, Indiana (hereinafter IPS), the members of the Board, and its appointed Superintendent of Schools.

On August 18, 1971, this Court found and concluded that IPS was guilty of unlawfully segregating the public schools within its boundaries. That decision was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit and review was denied by the Supreme Court of the United States, without dissent. United States v. Board of Sch. Com'rs, Indianapolis, Ind., D.C., 332 F.Supp. 655, aff'd 7 Cir., 474 F.2d 81, cert. den., 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973). Such issue is res judicata.

In contemplating a remedy to vindicate the rights of Negro school children, this Court concluded that it could have ordered a massive "fruit basket" scrambling of students within IPS to achieve exact racial balancing. But the Court also concluded that in the long run, given the steadily rising percentage of Negro pupils within IPS, the racial composition of IPS would become nearly all Negro because of an acceleration in the departure of white families with children from IPS. In this connection the Court discussed the "tipping-point" factor—the point at which white exodus from a school unit is accelerated by increase of Negro students beyond a certain variable percent, and noted that the tipping-point/resegregation problem would become insignificant if the boundaries of IPS were enlarged to include all of Marion County and a portion of its contiguous metropolitan region. The Court does not consider its conclusions in this area as res judicata.

In order to provide an appropriate adverse setting for further consideration of the legal and practical appropri-

ateness of a metropolitan plan, the Court ordered the plaintiff United States to secure the joinder of necessary parties and seek further relief to determine the answers to certain questions posed by the Court.

On September 7, 1971, the United States (hereinafter the Government), pursuant to such order, moved to add as parties defendant all school corporations in Marion County, other than IPS. The motion was granted. However, the Government failed to assert any claims or seek any relief against such added defendants. A few days later the Buckley plaintiffs filed their petition to intervene in this action in their own right and as representatives of a class consisting of Negro school age children residing in Marion County, Indiana, who are required to attend segregated schools operated by IPS. The petitioners alleged that their interests and those of the class they represented were not being adequately protected by the original plaintiff, the United States, because the Government had failed to seek relief against the added school defendants. The Court granted the petition to intervene on September 14, 1971.

The Buckley intervening plaintiffs (hereinafter plaintiffs) eventually joined as added defendants Edgar D. Whitcomb (since succeeded by Otis R. Bowen), as Governor of the State of Indiana; Theodore Sendak, as Attorney General of Indiana; John J. Loughlin (since succeeded by Harold H. Negley), as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, and nineteen school corporations within and without Marion County, Indiana (including the ten in-county corporations joined by the Government), as follows:

Marion County

The Metropolitan School District of Decatur Township (hereinafter Decatur)

The Franklin Township Community School Corporation (hereinafter Franklin)

The Metropolitan School District of Lawrence Township (hereinafter Lawrence)

The Metropolitan School District of Perry Township (hereinafter Perry)

The Metropolitan School District of Pike Township (hereinafter Pike)

The Metropolitan School District of Warren Township (hereinafter Warren)

The Metropolitan School District of Washington Township (hereinafter Washington)

The Metropolitan School District of Wayne Township (hereinafter Wayne)

School City of Beech Grove (hereinafter Beech Grove)

School Town of Speedway (hereinafter Speedway)

Boone County

Eagle-Union Community School Corporation (hereinafter Eagle)

Johnson County

Greenwood Community School Corporation (hereinafter Greenwood)

Hamilton County

Carmel-Clay Schools (hereinafter Carmel)

Hancock County

Greenfield Community School Corporation (hereinafter Greenfield)

Mt. Vernon Community School Corporation (hereinafter Mt. Vernon)

Hendricks County

Avon Community School Corporation (hereinafter Avon)

Brownsburg Community School Corporation (hereinafter Brownsburg)

Plainfield Community School Corporation (hereinafter Plainfield)

Morgan County

Mooresville Consolidated School Corporation (hereinafter Mooresville)

The geographical areas served by IPS and added defendants, with the exception of Greenfield, and Union Township of Eagle-Union, are reflected on Figure 1. Also represented thereon, for reasons which will hereafter appear, are territories or parts of territories served by certain other school corporations bordering on Marion County, namely, Clark-Pleasant Community School Corporation (Clark) and Center Grove Community School Corporation (Grove) of Johnson County; Delaware and Fall Creek Townships, a part of Hamilton Southeastern School Corporation of Hamilton County; Sugar Creek Township, a part of Southern Hancock County Community Schools (Hancock) of Hancock County; and Moral Township, a part of Northwestern Consolidated School Corporation of Shelby County (Northwestern) of Shelby County.

The intervening defendant Citizens of Indianapolis for Quality Schools, Inc., is a not-for-profit corporation whose members are parents of children in IPS. Its initial attempt to intervene in this action, in opposition to the original complaint of the Government, was denied by this Court, although the Court permitted it to attend the original trial, present argument, and file a brief *amicus curiae*. The ruling was appealed and affirmed. United States v. Board of Sch. Com'rs, Indianapolis, Ind., 466 F.2d 573 (7 Cir. 1972). Subsequently, however, intervention was permitted and intervening defendant participated fully in the most recent trial.

Coalition for Integrated Education is an unincorporated association of individuals favoring a metropolitan plan of school desegregation, which filed a petition for leave to appear *amicus curiae* for the purpose of presenting a desegregation plan, and a supplemental motion for leave to file a brief. The names of the members of the association are attached to the original petition. The motion for leave to file a brief as *amicus curiae* is granted. The Court reserves ruling on the petition to file a plan, as premature.

II.

The Issues

The issues of fact submitted for trial are as follows:

1. Whether or not desegregation of IPS within its present boundaries (sometimes referred to as an "Indianapolis Only Plan") can be accomplished as required by the equal protection clause of the Fourteenth Amendment in such a manner as to "work," within the meaning of Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689,

20 L.Ed.2d 716 (1968): "The burden on a school board today is to come forward with a plan that promises realistically to work . . ."

2. Whether or not any of the added defendant officials of the State of Indiana, their predecessors in office, or the added defendant The Indiana State Board of Education have acted to promote segregation, or failed to carry out duties imposed upon them by law in such a manner as to promote segregation or inhibit desegregation within IPS.

3. Whether or not any of the added defendant school corporations have acted to promote segregation either within IPS or within their own boundaries.

The issues of law presented are as follows:

1. Whether or not the acts of *de jure* segregation heretofore found to have been practiced by IPS can be imputed to the State of Indiana such that appropriate State officials or agencies may be directed to afford relief to vindicate the Fourteenth Amendment rights of plaintiffs and their class.

2. Whether or not appropriate State officials or agencies have the power to direct reorganization of IPS with other school corporations, or to direct the transfer or exchange of IPS pupils to or with other school corporations in order to vindicate such rights.

3. Whether or not this Court may act in the manner just described to vindicate such rights if responsible officials or agencies of the State fail to do so within a reasonable time.

III.

Viability of an Indianapolis Only Plan

As stated above, the Court in its original opinion expressed some doubts as to whether or not a stable desegregation plan could be established within the confines of IPS, based upon the evidence adduced at that trial, which was all to the effect that when the percentage of Negro pupils in a given school approaches 40%, more or less, the exodus of white pupils from such a school becomes accelerated and irreversible, resulting in resegregation. However, additional evidence on this issue was adduced at the recent trial, and the Court bases its findings exclusively upon such latter evidence.

Having considered such evidence, the Court finds it to be a fact that when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues, as demonstrated by Figure 2. All witnesses agreed that once a school becomes identifiably black, it never reverses to white, in the absence of redistricting. Therefore, progressions from white to black are irreversible once the critical percentage has been reached in the absence of intervention through redistricting. Below the critical percentage, however, schools tend to remain stable, as demonstrated on Figure 3. With further reference to Figure 3, it will be noted that there is one elementary school within IPS which has remained stable over the past five years with a high degree of integration. This lone exception is School 86, which the Court judicially knows to be located in the Butler-Tarkington area of the city, mentioned in the testimony as an area in which the residents, black and white, have worked together for the past several years in a community

relations program designed to maintain the stability of the neighborhood as an integrated community. The results achieved show dramatically that such a program can be made to work, but unfortunately the other statistics illustrate all too well that the Butler-Tarkington situation is the exception and not the rule.

The Court has no reason to find or believe that a crash IPS-wide community relations program, even if one were in progress (and none is), would achieve a system-wide stabilization in time to preserve the entire system from becoming identified as racially black. The Court further finds that, given the present percentage of Negro pupils in the IPS system, which has risen to 41.1% since the previous trial, and the further fact that black enrollment in IPS will in the near future surpass white enrollments therein, as graphically illustrated on Figure 4, the right of plaintiffs and their class to attend schools which are not racially identifiable, as provided by the equal protection clause of the Fourteenth Amendment, cannot be accomplished within the present boundaries of IPS in a way that will work for any significant period of time.

In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifable as a black school. As a matter of fact, IPS announced rather dramatically during the recent trial that such a plan would be put into effect for the coming school year, but rejected such plan at its recent meeting of July 16, 1973, as the Court knows judicially. As demonstrated, however, such a plan, if put into effect, would have the effect of an immediate acceleration of white students into suburban white enclaves or private schools,

so that IPS as a whole would predictably have a black majority within a matter of two or three years. This is not the Court's idea of a plan which "promises realistically to work."

On the other hand, the alternative to such a plan is to limit desegregation to figures which are statistically tolerable insofar as "white flight" is concerned, such as to provide that schools which now contain few or no Negro students accept additional numbers of the minority race, not to exceed perhaps 20% to 30%. Such a plan would, of course, have the effect of affording education in a desegregated setting to those minority race students attending schools in which they would make up the minority of 20% to 30%; but considering the total percentage of minority race students in the IPS system, it is equally obvious that such a plan would leave a large number of schools with a minority percentage in excess of 50%, which would not only make them racially identifable schools, but would once again accelerate white flight from those particular schools.

On this key question as to whether a meaningful desegregation plan could be put into effect within the confines of IPS, the Court heard expert opinions from numerous witnesses called by each side. As usual, they disagreed. However, in the Court's opinion, a clear preponderance of the expert opinion was that no feasible plan could be devised. Those who testified to the contrary tended to qualify their opinions, and in some instances the facts presented by such witnesses simply did not support their conclusions.

For example, Dr. Mercer, a witness called by the Government, testified as to numerous facts having to do with desegration efforts in the State of California, and presented the City of Riverside as a city where desegregation

was apparently working well. However, it developed that the Riverside plan was put into effect voluntarily, accompanied by much community relation effort sponsored by the school and the local news media, and finally that the percentage of minority race students in the entire system was less than 25%. None of these facts have any relation to the situation in Indianapolis. On the other hand, the witness's own Figure 7, which is the last sheet of Government Exhibit 14, discloses the sharp and dramatic drop in "other-white" students in Inglewood, Pasadena, and San Francisco following public announcement that such schools would be required to desegregate, later followed by the filing of legal actions to accomplish such end. (The term "other-white" in California refers to those persons called "Anglos" in Denver and simply "whites" or "Caucasians" in Indianapolis. The California "other-white" is a white who does not have a Spanish surname.)

The testimony of another defense expert, Dr. Hooker, was completely demolished by cross-examination showing that in his published articles he had expressed views opposite to those given in this case, and Dr. Dodson testified that a metropolitan plan would be superior to one limited to IPS.

The solution, therefore, must be to look elsewhere, if this can be done within the law.

IV.

Responsibility of the State of Indiana

In its previous opinion of August 18, 1971, the Court devoted several pages of its opinion to tracing the history of segregation within Indiana beginning 1800, demonstrating that the State, through its legislative, executive, and judicial branches had practiced all manner of discrimina-

tion against Negroes, not only in the field of education, but in housing and innumerable sectors of their social and economic life, as well as in the area of civil rights. 332 F. Supp. pp. 658-665. None of such regrettable history, of which the Court then took judicial notice, has been refuted by any added defendant, with the exception of a quibble about the effect of certain school laws passed in 1961 and thereafter. The Court therefore incorporates such previous history into this opinion by reference, save to the extent that its discussion of Acts of the General Assembly of 1961 and thereafter will be reviewed further hereafter.

Before entering into a discussion as to the specific acts or omissions of State officials having a bearing on the problems of segregation and desegregation, it seems appropriate at this point to set out in detail the role of the State in public education in Indiana, touched upon rather briefly in this Court's previous opinion.

The original seaboard colonies were, of course, founded in the 17th and 18th Centuries, when the concept of public education was unheard of. As a result, such schools which existed therein in the early days were either church supported or were supported strictly by private funds. The relics of that system linger today in various states which evolved from the original colonies so that, for example, the decision in Bradley v. School Board of City of Richmond, Virginia, 462 F.2d 1058 (4 Cir. 1972), (*"Richmond"*), based its decision reversing an order of the District Court for a metropolitan desegregation plan in Richmond and surrounding counties primarily on the basis that the operation of public schools within the different counties of the Commonwealth of Virginia is a matter of local option, and that, if the option be exercised, the power to operate, maintain and supervise the public schools in

a given county is in the exclusive jurisdiction of the local school board and not the state.

However, following the successful conclusion of the Revolutionary War, it was foreseen by the Congress that an educated citizenry was vital to maintaining an enlightened self-government as provided for in the Constitution, and hence the education of all citizens became a concern of the Government. Thus it was that when the Northwest Territory was formed out of lands formerly claimed by the Commonwealth of Virginia, the Northwest Ordinance of 1787 provided:

> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III.

The State of Indiana along with the states of Michigan, Ohio, Illinois, Wisconsin, etc., were, of course, later formed out of the Northwest Territory, and such states accordingly provided by their respective constitutions for the establishment of systems of public education. The original 1816 Constitution of Indiana, Sections 1 and 2, Article 9, paraphrased the above quoted language from the Northwest Ordiance and provided that it should be the duty of the General Assembly to provide by law for a general system of education, ascending in a regular graduation from township schools to a state university wherein tuition would be free, and equally open to all. Article 8, Section 1, of the present Constitution, adopted in 1851, carries forward the duty of the State in the following language:

> "Knowledge and learning, generally diffused throughout a community, being essenial to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable

means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

[1-3] Under the 1851 Indiana Constitution, the common schools as a whole are made a state institution. Ratcliff v. Dick Johnson School Tp., 204 Ind. 525, 185 N.E. 143 (1933); Ehle v. State, 191 Ind. 502, 133 N.E. 748 (1922); City of Lafayette v. Jenners, 10 Ind. 71 (1857). The State owns and maintains the common schools just as it does its public institutions of every kind. State v. Haworth, 122 Ind. 462, 23 N.E. 946 (1890). School corporations within the system only hold title to such schools as trustees and the State has the right to change trustees by annexation at will. Board of School Com'rs v. Center Tp., 143 Ind. 391, 42 N.E. 808 (1896). The legislature may consolidate schools by resolution without notice to the voters or without any referendum or election. Fruit v. Metropolitan Sch. Dis. of Winchester, etc., 241 Ind. 621, 172 N.E.2d 864 (1961).

[4, 5] It was the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the State. Green Castle Township v. Black, 5 Ind. 557 (1854); State v. Eddington, 208 Ind. 160, 195 N.E. 92 (1935). The authority over the schools and school affairs resides exclusively within the dominion of the legislature and the school system is a centralized and not a localized form of school government. Gruber v. State, 196 Ind. 436, 148 N.E. 481 (1925); Jordan v. City of Logansport, 178 Ind. 629, 99 N.E. 1060 (1912); State v. Ogan, 159 Ind. 119, 63 N.E. 227 (1902); State v. Haworth, *supra;* State v. Eddington, *supra.*

[6] Under Article 8 of the Indiana Constitution, the power of the General Assembly to regulate the school sys-

tem is practically unlimited. Kostanzer v. State, 205 Ind. 536, 187 N.E. 337 (1933). The employees of a school corporation undertake their duties not as officers of local units of self government but as officers of the public school system, which is a State institution. State v. Eddington, *supra.*

[7] The General Assembly has the power to prescribe the terms of the employment contracts to be executed by school corporations, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1937), and the power to provide a general system of licenses for those desiring to teach. Stone v. Fritts, 169 Ind. 361, 82 N.E. 792 (1907).

[8] While the State in acting directly to carry out its educational functions under Article 8, Section 1, is not forbidden to create and use local corporations for that purpose, it assumes responsibility for the conduct of these corporations. Such corporations were and still are involuntary corporations established as part of the school system of Indiana and are but agents of the State for purposes of administering the State system of education. Indiana ex rel. Anderson v. Brand, *supra;* Campbell v. City of Indianapolis, 155 Ind. 186, 57 N.E. 920 (1900); Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N.E. 312 (1895). Such corporations may only exercise the authority given them by the State, Ratcliff v. Dick Johnson School Tp., *supra;* Ehle v. State, *supra,* and the conduct and practices of these agent corporations must be considered acts of the State. Hummer v. School City of Hartford City, 124 Ind.App. 30, 112 N.E.2d 891 (1953), overruled in part on other grounds, Flowers v. Bd. of Com'rs of County of Vanderburgh, 240 Ind. 668, 168 N.E.2d 224 (1960).

Robinson v. Schneck, 102 Ind. 307, 1 N.E. 698 (1885), held that it was constitutional for the legislature to provide

by general law for local school authorities to levy school taxes. Some of the general language in that case could suggest that local school corporations are to be treated as local units of self-government, as in Virginia. To clear up such an implication, the Supreme Court of Indiana in State v. Haworth, *supra,* made it clear that Robinson did not change the relationship of school corporations as agents of the State. The majority opinion specifically rejected the dissenting opinion's argument based on *Robinson* that the school corporations in the State are units of self-government in which local control of the schools is left with the people within such corporation. The majority held instead that the authority and control of schools and school affairs is vested exclusively in the General Assembly and that such affairs are intrinsically matters of State concern and not of a local jurisdiction. "In such matters, the State is a unit, and the legislature the source of power." To the same effect, see Ft. Wayne Community Schools v. State, 240 Ind. 57, 159 N.E.2d 708 (1959).

To summarize in the words of the court in State v. Mutschler, 232 Ind. 580, 115 N.E.2d 206 (1953):

> "The people of Indiana have translated into a fundamental constitutional postulate the belief that the general diffusion of knowledge and learning throughout a community is essential to the preservation of free government, and in harmony with this constitutional postulate the Constitution recognizes that the business of education is a governmental function *and makes public education a function of state government as distinguished from local government.* . . . It was evidently the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the state, and make it a quasi-department of the state government, *a centralized and not a localized,* form of school government." (Emphasis added.)

The Indiana statutes on education are testimony to the constitutional and decisional history just discussed. The Indiana State Board of Education and its predecessor have been given great powers, and "It shall be the duty of the board to coordinate the work of the various commissions so as to bring about an effective and an (*sic*) unified school program and to make determinations in matters of jurisdiction between such commissions in accordance with the law, but all actions of the commissions within their respective jurisdictions shall be final." The "commissions" are on general education, textbook adoption, and teacher training and licensing. Indiana Code 1971, 20-1-1-1 & 20-1-1-2, Burns Ind.Ann.Stat. (hereinafter "Burns") § 28-101, 28-102.

Following said Section 20-1-1 of the Indiana Code of 1971, the first section having to do with schools, there follow some 349 solid pages of statutes enacted by the General Assembly regulating virtually every phase of school operation, printed single spaced, on unusually wide paper, in a type style reminiscent of that used in the exclusions section of an insurance policy. The annotated version of these laws occupies two complete volumes of Burns, comprising some 1,154 standard pages (but with annotations in small type), exclusive of indices and pocket parts. Burns, Vol. 6, parts 3 and 4. The administrative rules and regulations concerning education consume an additional 126 pages. Burns Ind.Adm.R. & Reg., Title 28. For obvious reasons, the Court will attempt no summary of this vast compendium, except to say generally that all phases of the operation of the public schools are regulated, in one way or another, by the State.

Of particular importance here, however, should be noted the statute, in effect from 1949 until 1972, which

vested in the commission on general education of The Indiana State Board of Education the power and duty to regulate new school sites and buildings or any modifications of or additions to existing buildings, and established a division of schoolhouse planning under a director to be appointed by the state superintendent of public instruction with the approval of the governor. IC 1971, 20-1-2-1 to 20-1-2-6, Burns 28-301 to 28-306. Such law was repealed in 1972, but only because it was at such time replaced by a similar law. IC 1971, 20-1-1-6, as added 1972; Burns 28-109 (Pocket supp.).

Questions identical to those presented in this action have been considered by the Court of Appeals for the Sixth Circuit in Bradley et al. v. Milliken et al., 484 F.2d 215 (1973). In upholding the trial court's determination that a metropolitan remedy would be appropriate to accomplish desegregation of the public schools of Detroit, it based its holding upon discriminatory practices on the part of both the Detroit school board and the State of Michigan found to be "significant, pervasive and causally related" to the segregation in the Detroit school system.

The discriminatory practices of the Detroit school board were, in general, acts of commission identical to those found to have occurred in Indianapolis, such as gerrymandering school attendance zones, making boundary changes which promoted segregation, providing optional attendance zones in "changing" areas, assigning teachers and staff so as to mirror the racial complexion of a school's student body, assigning students to elementary and high schools according to the racial patterns of the feeder schools, selecting sites for new schools and building additions to existing schools in such a fashion as to separate the races, etc.

As between the four discriminatory practices charged to the State, the Sixth Circuit held:

> "The clearest example of direct State participation in encouraging the segregated condition of Detroit public schools, however, is that of school construction in Detroit and the surrounding suburban areas. Until 1962 the State Board of Education had direct statutory control over site planning for new school construction. During that time, as was pointed out above, the State approved school construction which fostered segregation throughout the Detroit Metropolitan area . . . . Since 1962 the State Board has continued to be involved in approval of school construction plans."

[9] In the case at hand the evidence shows that Arlington High School was opened in 1961 with a Negro enrollment of 0.23%, Northwest High School was opened in 1963 with a Negro enrollment of 0.0%, and John Marshall High School was opened in 1967 with a Negro enrollment of 0.3. Inspection of maps in evidence discloses that Arlington is less than a mile from the extreme northeast corner of IPS, Marshall is squarely on the extreme east line of IPS, and Northwest slightly less than a mile from the extreme west line of IPS. This Court found in its previous opinion, and finds once again, that the placement of such schools constituted acts of *de jure* segregation on the part of IPS. The former holding has already been affirmed by the Seventh Circuit, 474 F.2d at pp. 87, 88. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

Here, as in Michigan, the sites for the three high schools mentioned were necessarily approved by the appropriate agencies of defendants The Indiana State Board of Education and the Superintendent of Public Instruction. On the authority of *Bradley,* these were acts of *de jure*

segregation on the part of officials of the State. Similar examples could be pointed out with regard to site selection for construction and enlargement of elementary schools, but the foregoing examples are so obvious that there is no need to labor the point.

[10] Further, at all times since 1949, the Indiana statute forbidding racial segregation in educational opportunity has been in effect, IC 1971, 20-8-6-1 et seq., Burns 28-6106 et seq., and the mandate of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), has been the law since 1954. According to the evidence in this case, the officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area. Even at this late date, the division of equal educational opportunity of the Indiana Department of Public Instruction, headed by the State Superintendent, consists of but four staff members and a secretary, to cover the entire State of Indiana, and has only been in existence for the past two years pursuant to a Federal grant. The Court finds that the failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation.

V.

Acts of Added Defendant School Corporations

There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had

the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, as illustrated on Figure 5. However, with respect to the added defendants situate within Marion County, the evidence is that when the Marion County School Reorganization Committee, appointed pursuant to the Indiana School Reorganization Act of 1959, IC 1971, 20-4-1-2, Burns 28-3501 et seq., made its initial and unanimous recommendation that all of the school systems in Marion County be merged into one metropolitan system, the added Marion County defendants were unanimous in their opposition to the plan (which was, however, favored by IPS). Subsequently, and for the stated reason that in its opinion the metropolitan plan could not be adopted in view of the suburban opposition, the Reorganization Committee completely reversed itself and proposed a plan which, with minor exceptions having to do with areas within Center Township, froze all existing school corporations in Marion County according to their then existing 1961 boundaries.

Thus school reorganization in Marion County, rather than reorganizing anything except the name and method of school government as to certain added defendants, did nothing at all. By way of contrast, the evidence is that on a state-wide basis reorganizations pursuant to the Act of 1959 ultimately resulted in reducing the number of school corporations by approximately 50%, and created school corporations merging what had formerly been separate corporations in cities, towns, and their adjoining unincorporated areas, as well as merging what had formerly been separate township systems into consolidated systems. Some of the latter mergers extended across county lines, as reflected by defendant Wayne's Exhibit D. As to IPS,

this farcical "reorganization" had the effect of making it technically a reorganized school corporation, and thus hampered its ability to be further reorganized without complying with all of the cumbersome procedures of the 1959 Act and other crippling legislation.

That the added defendants had a legal right to resist the recommendation of the School Reorganization Committee under existing law cannot be denied. At the same time, it is apparent that confining IPS to its existing territory had the effect, which continues, of making it first difficult and now impossible to comply with the law requiring meaningful desegregation.

At this point the Court deems it appropriate to consider briefly the question as to why Figure 5 reflects such a remarkable absence of Negro citizens from the territories of the added defendants with the exception of Washington and Pike (those Negro citizens residing in Wayne are concentrated in that part of Wayne which is within IPS, according to school enrollment figures). Such absence is particularly glaring under the evidence, which reflects virtually no Negroes in Speedway, which has within its borders Detroit Diesel Allison Division of General Motors Corporation, the largest single employer of labor in Marion County; virtually none in Beech Grove, which houses the shops of the Penn Central Transportation Company; virtually none in Warren outside IPS, although Western Electric, situate in Warren Township, employs thousands of persons who busily make all of the telephones for American Telephone and Telegraph. Equally remarkable is the absence of Negroes from Lawrence which has the vast Army Finance Center located some two miles east of its high school. Either it must be concluded that Negroes, unlike other citizens, simply do not like to live

near their places of employment (and all of the employers mentioned are equal opportunity employers), or there must be some other reason.

In *Richmond* the court said, among other things, "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known . . ." This Court finds that statement incredible. Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else.

In the trial just concluded a witness called by the added defendants conceded that Negroes have been severely limited in their search for housing in the Indianapolis area to properties advertised in local newspapers as "for colored," and experts called by the Government testified that discrimination has been a root cause of the black central city phenomenon.

The Court sees no point in laboring the obvious. If racial discrimination did not exist in the United States, Indiana, and the Indianapolis metropolitan area, it would not be necessary to have laws against it. Yet the past ten years have brought forth a spate of such laws, local and national, preceded by reports of investigating commissions without end, all pointing up what every citizen knows—that discrimination is yet with us in a nation which daily pledges that it is ". . . one nation, under God, *indivisible,* with liberty and justice for *all.*"

Such racial discrimination, which has been tolerated by the State at the least, in some instances has been actively

encouraged by the State, as set out in this Court's previous opinion, has had, as its end result, the creation of an artificial unrepresentative community, as pictured by the exhibits in this case. At the very least it may be said that Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State.

The foregoing should not be taken to mean that this action is one having to do with discrimination in housing, and this Court does not consider that a school desegregation action is one in which it is appropriate to attempt to remedy such discrimination, past or present. However, when it may be demonstrated that, as here, the discriminatory customs and usages mentioned have had a demonstrably causal relationship to segregation in the schools, such factor should not be casually swept under the table as in *Richmond*.

VI.

Conclusions of Law

The Court concludes, as a matter of law, as follows:

[11] 1. The acts of *de jure* segregation heretofore found to have been practiced by IPS can be, and are imputed to the State of Indiana.

2. The Superintendent of Public Instruction, The Indiana State Board of Education, and other responsible agents and agencies of the State of Indiana, and the State itself, have each practiced *de jure* segregation, both by commission and omission.

[12] 3. The General Assembly of the State of Indiana has the power, and it is its duty, to devise a metro-

politan plan of common school education in the Indianapolis metropolitan area, which may be to direct the reorganization of IPS with other school corporations, in whole or in part, or to direct the transfer or exchange of IPS pupils to or with other school corporations, in such a manner as to vindicate the Fourteenth Amendment rights of plaintiffs and all Negro children presently within the jurisdiction of IPS to attend desegregated, non-racially identifiable schools.

4. If the General Assembly fails to act in the manner described within a reasonable time, this Court has the power and the duty to devise its own plan, and to order the defendant and the added defendant school corporations, State Superintendent of Public Instruction, and The Indiana State Board of Education to implement the same.

[13] In short, paraphrasing the holding of the Sixth Circuit in Bradley et al. v. Milliken et al., *supra*, this Court holds that the record establishes that the State has committed *de jure* acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of *Brown II*. Brown v. Board of Education, 349 U.S. 294, 300-301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. United States

v. Scotland Neck Board of Education, 407 U.S. 484, 489, 92 S.Ct. 2214, 33 L.Ed.2d 75 (1972); Wright v. City of Emporia, 407 U.S. 451, 463, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972); United States v. State of Texas, 447 F.2d 441, 443-444 (5 Cir. 1971); Haney v. County Board of Education of Sevier County, 429 F2d 364, 368 (8 Cir. 1970). See also Davis v. Board of School Commissioners, 402 U.S. 33, 36-38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971).

There exists, however, an even more compelling basis for this Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). If we hold that school district boundaries are absolute barriers to an IPS school desegregation plan, we would be opening a way to nullify Brown v. Board of Education which overruled *Plessy, supra*.

VII.

The Area of a Viable Metropolitan Plan

In considering a metropolitan plan, it is apparent that, to name a few factors, the area should be reasonably compact in size in relation to is center, should not be separated by massive natural obstacles, and otherwise should be adaptable to the reasonably speedy transportation of school children. Also, it would seem only reasonable to examine whether or not the area to be considered has significant common interests with the area hub. The Court now examines the situation with regard to the area depicted on Figure 1.

In the first place, the Court knows judicially that the entire area consists of virtually flat land, gently sloping

from the northeast to the southwest with a fall of approximately 150 to 200 feet in approximately 35 miles. The area contains no natural barriers of any consequence; two fairly sizeable reservoirs, Giest and Eagle Creek, are located northeast and northwest, respectively, and pose no obstacle to movement of people to or from the center of the area, while White River is little larger than a robust creek, and is crossed by numerous bridges. With a very few exceptions, such as added defendants in their roles as employers, all industrial plants and other major places of employment within the area are concentrated either within the boundaries of IPS or are within a few city blocks of such boundaries in Wayne and Warren Townships and the towns of Speedway and Beech Grove. Indeed, as the evidence discloses, many of the added defendant school corporations are the largest single employers of labor within their respective borders!

The employment situation is represented on Figure 6, which shows graphically that, with the exception of the City of Greenfield (not shown on Figure 1), more than half (in most cases more than 60%) of the residents of each unit shown on Figure 1 are employed in Marion County—as a practical matter in IPS, or within a few city blocks thereof. If the rather substantial number of workers who did not list their place of employment are distributed in proportion to those who did, it is apparent that the true percentage of Marion County workers in the area is even higher than as indicated.

The employment picture just described results in huge flows of traffic from the "bedroom" townships primarily to Center, Warren and Wayne Townships of Marion County each weekday morning, and back again each evening. In order to accommodate this flow of traffic, the

Indinapolis area, with a huge assist from the Federal government, is blessed with an extraordinarily efficient highway network. The central area is completely looped by Interstate Highway I-465, a six-lane, divided, limited access highway, typical of such highways in the Interstate System. The loop varies in its distance from Monument Circle, the hub of downtown Indianapolis, from as little as 4.50 miles, due south, to as much as 11.50 miles to the northwest, averaging perhaps six or seven miles in distance from such central reference point. Additionally there are no less than seven additional legs of Interstate highways branching off of I-465, and in some instances, coming inside the I-465 loop. Specifically, I-74 runs northwest and southeast from I-465, I-69 runs northeast from I-465, I-70 runs southwest and due east from I-465 (with construction in progress to link up both legs through the center of this city), and I-65 runs northwest and southeast from I-465 (I-65 will also link both of its legs through the center of the city, and the north leg is already open from I-465 to 11th and Meridian Streets, in downtown Indianapolis).

In addition, there are many other multilane highways leading into, out of, and through the central area, many of which are divided, such as S. R. 67 to the southwest and northeast, U. S. 40 due east and west, S. R. 431 and U. S. 31, each running due north and south to southeast, S. R. 37 south and northeast, and S. R. 100, running along the north and east sides, just inside I-465. Such routes, and other main highways, are illustrated on Figure 7.

Virtually all points of interest for cultural, sports, and higher educational activities are located within IPS. For example, as the Court knows judicially, Butler University, Marian College, Indiana Central College, the Indianapolis campus of Indiana and Purdue Universities are so located,

as are the Indianapolis Zoo, the Children's Museum, the Indiana State Fairgrounds, the Indiana Capitol and office buildings, all major federal offices, Clowes Hall (an outstanding theater for the performing arts), the Indianapolis Sports Arena, the Indianapolis Convention Center, etc. The Indianapolis Art Museum directly adjoins an IPS boundary, as does the Indianapolis Motor Speedway (located in Speedway).

Just as the working parents of the suburbs drive back and forth to work each day, so are most suburban children bused to and from school. As shown on Figure 8, out of 114,696 students in suburban schools, 90,266 or 78.7% are bused. The State reimburses each school corporation a portion of the cost of busing each child. (Also, it should be noted, the State reimburses each added defendant, except Speedway, a substantial portion of its costs of operation, according to a complicated formula.) These bus routes are extremely time consuming, as anyone knows who has the misfortune to follow a bus down the highway, since the custom in the suburban areas is to pick up the children on virtually an individual basis. However, assuming that children walk to a central school or other convenient point, such as most IPS pupils do, and are then transported non-stop to their designated school of attendance via the major traffic arteries (during which period of transportation they would be going opposite to the flow of commuter traffic, and hence not impeded by it) the Court is of the opinion that—given logical and most convenient assignments—virtually all students could be delivered in thirty minutes. Thirty or even forty-five minutes is not an unreasonable time, and altogether comparable to that required for such transportation elsewhere in Indiana.

As shown in Figure 4, previously referred to, the white pupil enrollment *within IPS* is sharply falling, while that of Negro pupils is rising. On the other hand, the population of each area in which added defendants operate their schools, and the areas of non-defendant school districts adjoining Marion County are rapidly rising in population, virtually all white. These changes are illustrated in Figures 9, 10, and 11.

It was argued by added defendants that the Negro birth rate and in-migration had declined to the point where further increase in the black school population would not occur. This not only begs the question of white migration to the suburbs, but cannot be demonstrated statistically, as shown by Figure 12, reflecting that estimated black enrollments in grade 1 in 1973 virtually equal black births in Indianapolis in 1967—an obvious statistical improbability without continued in-migration.

With regard to the defendant Greenfield, Union Township of Eagle-Union and certain omitted townships of the non-defendants Hamilton Southeastern, Southern Hancock, and Northwestern, the Court is of the opinion that the distances involved are impractical, and therefore makes no recommendation that they be included in a metropolitan plan. The Court does recommend that all other added defendants be included in the metropolitan plan, as well as Eagle-Union to the extent of Eagle Township.

The Court observes that, on the basis of the applicable figures, the General Assembly may also wish to add the non-defendants Center Grove, Clark-Pleasant, Southern Hancock, Hamilton Southeastern to the extent of Delaware and Fall Creek Townships, and Northwestern to the extent of Moral Township to the plan. Its ability to do so is undoubted. State v. Mutschler, *supra*. However, the Court

can make no finding or recommendation with respect to these corporations until such time as they have had their day in court. Intervening plaintiffs are directed to interplead such corporations as additional added defendants forthwith.

VIII.

Constitutionality of Certain Indiana Statutes

Questions posed by the Court in its previous opinion inquired as to the constitutionality of certain Indiana statutes, specifically Chapter 186 of the Acts of 1961, IC 1971, 20-3-14-1, 20-3-14-10, Burns 28-2338, 28-2346, 28-2347 (1968 Cum.Supp.); Chapter 52 of the Acts of 1969, IC 1971, 20-3-14-9 Burns 28-2346a (1970 Cum.Supp.), and Chapter 173 of the Acts of 1969, IC 1971, 18-4-1-1 to 18-4-5-4, Burns 48-9101 et seq.

In the opinion of the Court such statutes, along with the application or the misapplication of the School Reorganization Act of 1959, certainly placed IPS in a strait jacket. However, in view of the Court's other findings and conclusions, it is unnecessary to consider the question of unconstitutionality.

IX.

Interim Relief

[14] The Court is of the opinion that it would be without jurisdiction to order the exchange of pupils between IPS and added defendants at this time. It is Negro children of IPS and not suburban children who are being deprived of a constitutional right, and so long as the various school corporations remain separate the Court believes that it would have no basis to direct that a suburban child be transported out of its own school corporation. However,

the Court knows of no reason why added defendants should not immediately accept a reasonable number of Negro children from IPS on a transfer basis, effective as of the beginning of the 1973-74 school year, and it is so ordered. In this connection, the evidence shows that virtually all added defendants routinely exchange or transfer pupils for various educational purposes. The Court can think of no more important form of special education for a Negro child than going to school in an integrated environment.

As shown by the evidence, Negro pupils constituted 39.5% of the 1972-73 enrollment of IPS, but constituted but 24.3% of the total enrollment in Marion County and 19.5% of the total enrollment in the Figure 1 area for the same period. Although a perfect racial balance in each school is not required by law and will not be ordered, the General Assembly will presumably give careful consideration to these relative percentages. Also, the General Assembly should keep in mind that "tokenism" will not, in the Court's opinion, meet constitutional requirements.

With respect to IPS itself, it is not true that children of both races may not be transported or otherwise exchanged. As repeatedly pointed out by this and all other Federal courts in the land, following, as we must, the pronouncements of the Supreme Court of the United States, there is nothing sacred about the attendance zones within a school corporation, no constitutional right in a student to attend a particular school (except that a child of a minority race has a right to attend a desegregated school), and so IPS must immediately take steps to reduce the amount of segregation in its system. However, final relief cannot be had until the General Assembly acts, or this Court is compelled to devise its own plan because of default on the part of the General Assembly.

The Court has given consideration to the average daily attendance in the various schools of added defendants, as shown by the evidence, and is pleased to note that such averages are all well below that permitted by State authorities. If each school accepted transfer of 5% of its present enrollment, this would amount to an average of little more than one child per classroom, which is certainly a reasonable figure and one well below what the Court believes a proper metropolitan plan should accomplish. However, exceptions should be noted in two instances—that of Pike and Washington.

Washington already has a Negro percentage of 11.29% and Pike a percentage of 8.17%. Washington has an exemplary record of fair treatment of its minority students, and has also aggressively added minority race members to its faculty and staff. Primarily, however, because of their present minority enrollments, transfers to these added defendants should be limited.

It is therefore considered and ordered that, as interim measures, the following be accomplished prior to the beginning of the 1973-74 school year:

1. IPS is directed to transfer to each of the added defendants, except Washington and Pike, a number of Negro students equal to 5% of the total 1972-73 enrollment of each transferee school, respectively, to transfer to Washington 1% of its 1972-73 white enrollment, and to Pike 2% of its white enrollment for the same school year. Provided, however, that the number of students who attended school in Union Township of Boone County for such school year shall be deducted from the Eagle-Union total before applying said percentage.

2. IPS shall not be required to transfer kindergarten students, nor students commencing their twelfth year. The

numbers of students in such grades enrolled in added defendants' schools for the year 1972-73 shall, however, be counted in arriving at the total to which the applicable percentage figure shall be applied.

3. Each of the added defendants is directed to accept such transferee students and enroll them accordingly.

4. The cost of transportation and tuition of such students shall be the obligation of IPS; provided, that IPS shall be entitled to a credit for any excess State reimbursement paid to a transferee corporation if any, as a result of the presence of transferred pupils.

5. If any teachers presently employed by IPS are rendered surplus as a result of this order, and additional teachers are needed by any added defendant as a result hereof, first consideration shall be given by such added defendant to employing a qualified IPS teacher.

6. The added defendants and IPS, through their respective boards, superintendents, or other designated agents are ordered to meet together forthwith, and to continue to meet until the various logistical problems made necessary by this order are resolved. Unresolved issues, if any, may be referred to the Court for ruling.

7. IPS is directed to rearrange the enrollment patterns in its elementary schools, effective at the beginning of the 1973-74 school year, such that each school will have a minimum Negro enrollment of in the area of 15%. The pairing or clustering of schools, and realignment of school assignment zones will be employed. Pairing or clustering should be of schools in close proximity, if possible. Such action will result merely in an expansion of the neighborhood or community school concept, and reduce the necessity of busing. If after utilizing such procedures, certain

schools do not meet the required numbers, pairing or clustering of schools in non-contiguous zones will be resorted to. *Swann,* 402 U.S. at 28, 91 S.Ct. 1267.

8. If transportation of pupils is required to accomplish the result just ordered, IPS and defendant officials of IPS are instructed that transportation of students of the two races shall be generally proportionate. However, nothing herein should be construed as preventing IPS from closing obsolete, heavily black schools if no longer needed for student housing, and in such event it will necessarily follow, in some cases, that a disproportionate number of black students will require transportation.

9. IPS is further directed to rearrange the feeder patterns of its high schools, so as to secure enrollment of Negro students in each school more nearly approaching their numbers in the system. Specifically, the number of such students in Thomas C. Howe High School should be increased to the area of 25%, and that at Shortridge reduced to not more than the area of 60%. In making transfers of high school pupils to added defendants, the Board should also keep in mind that Negro percentages at Arlington and Broad Ripple are already somewhat past the 40% level, and should be reduced, if possible.

10. All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation.

In this last connection, the Court was pleased to learn from the evidence of the recognition given to Negro students by their fellow white students in the few suburban schools which they attend, and of the honors, both scho-

lastic and otherwise, which such Negro students have earned in such schools. These facts, put in evidence by added defendants, indicate to the Court that children are basically inclined towards judging each other on the merits and that, if permitted to follow their own decent instincts, will accept each other on the basis of equality, without racial hatred. There just may be a message in this evidence for the adult world.

11. John O. Moss and John Preston Ward, attorneys for the intervening plaintiffs and their class, are entitled to recover their reasonable attorneys fees and expenses, and intervening plaintiffs are entitled to recover their costs. Such attorneys are directed to submit their respective petitions for fees and allowances. Apportionment of the cost of same is reserved.

12. The Court retains continuing jurisdiction herein.

All of the above is considered ordered, and adjudged this 20th day of July, 1973.

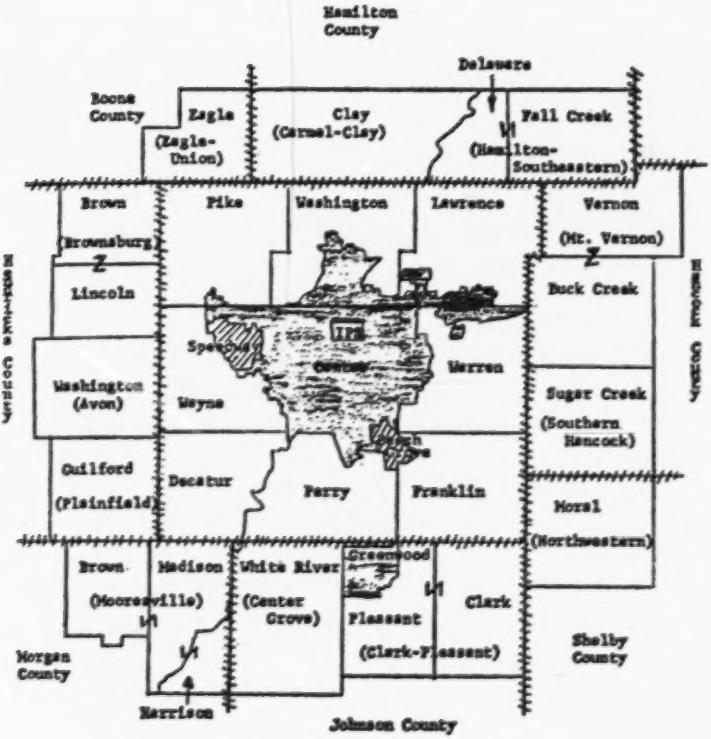
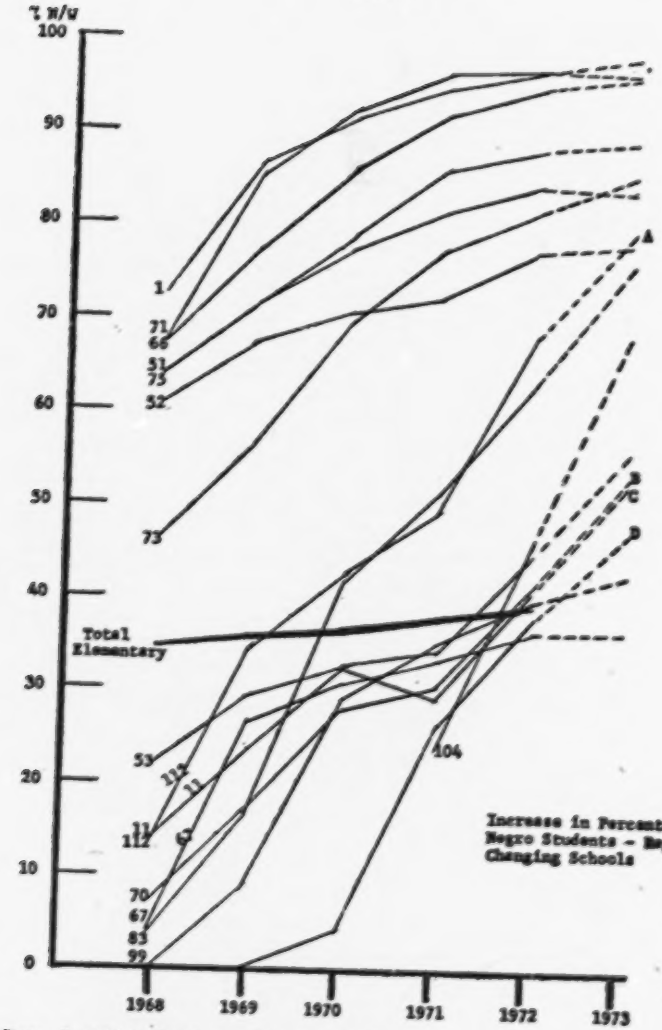

Hamilton County
Delaware
Boone County
Eagle
(Eagle-Union)
Clay
(Carmel-Clay)
Fall Creek
(Hamilton-Southeastern)
Brown
(Brownsburg)
Pike
Washington
Lawrence
Vernon
(Mt. Vernon)
Lincoln
Buck Creek
Spencer
Warren
Washington
(Avon)
Wayne
Sugar Creek
(Southern Hancock)
Guilford
(Plainfield)
Decatur
Perry
Franklin
Morsl
(Northwestern)
Brown
(Mooresville)
Madison
White River
(Center Grove)
Greenwood
Clark
Pleasant
(Clark-Pleasant)
Shelby County
Morgan County
Harrison
Johnson County
County Boundary
Scale
0 1 2 3 4 5
(miles)

Fig. 1



Key: A Public Housing Unit Opened 6/69
B Some Blacks Transferred Out, Whites In 1971
C Some Blacks Transferred Out, Whites In 1971
D Two Public Housing Units Opened 12/70

Fig. 2

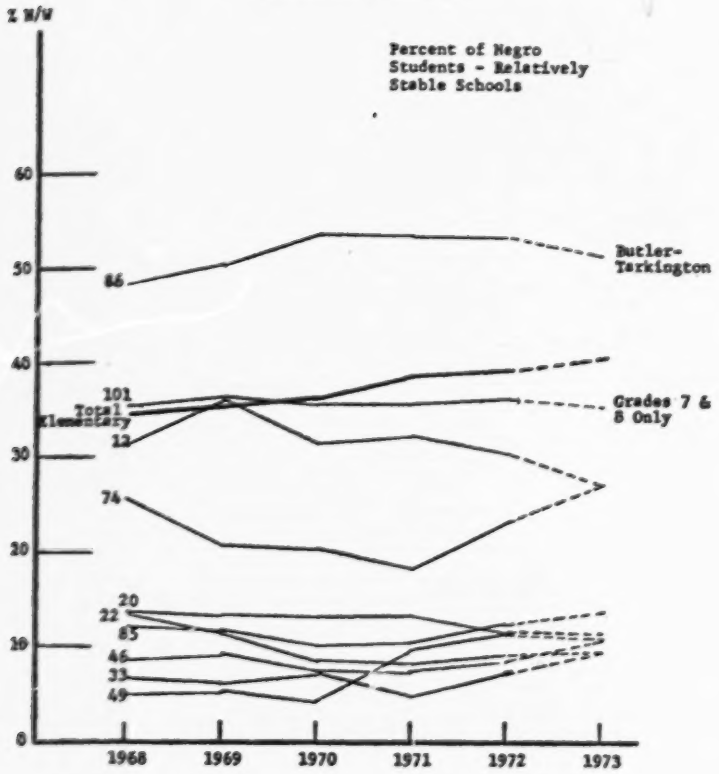

% N/W
Percent of Negro Students - Relatively Stable Schools
60
50
40
30
20
10
0
66
Butler-Terkington
101
Total Elementary
12
Grades 7 & 8 Only
74
20
22
83
46
33
49
1968
1969
1970
1971
1972
1973

Fig. 3

Per Cent White - Non-White Students - IPS

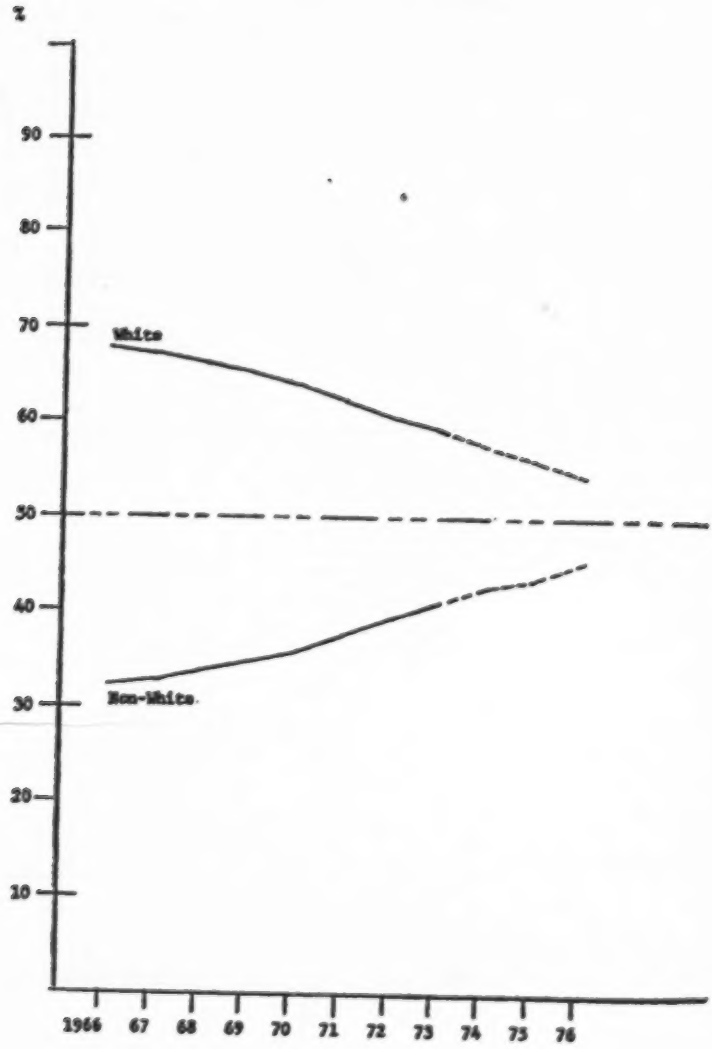
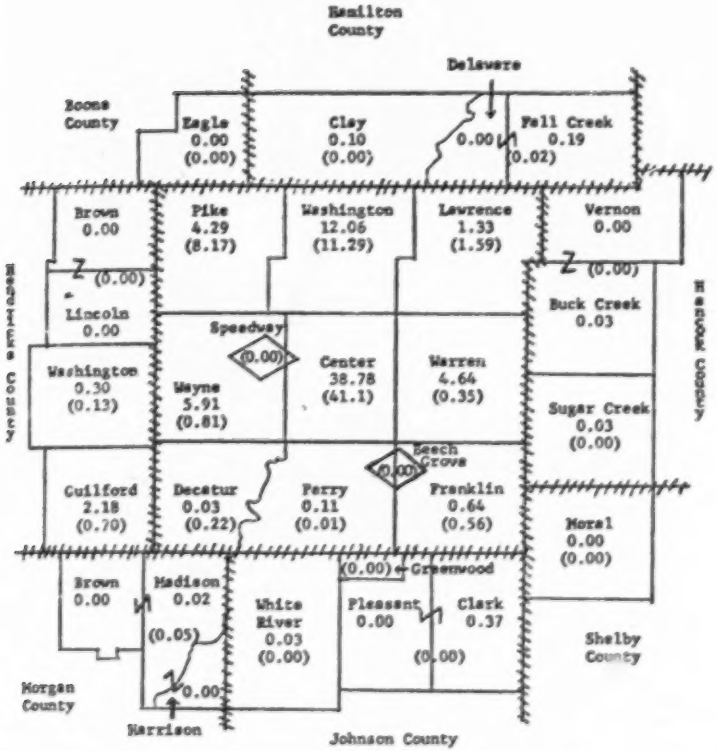


Fig. 4

Cite as 365 F.Supp. 1191 (1973)

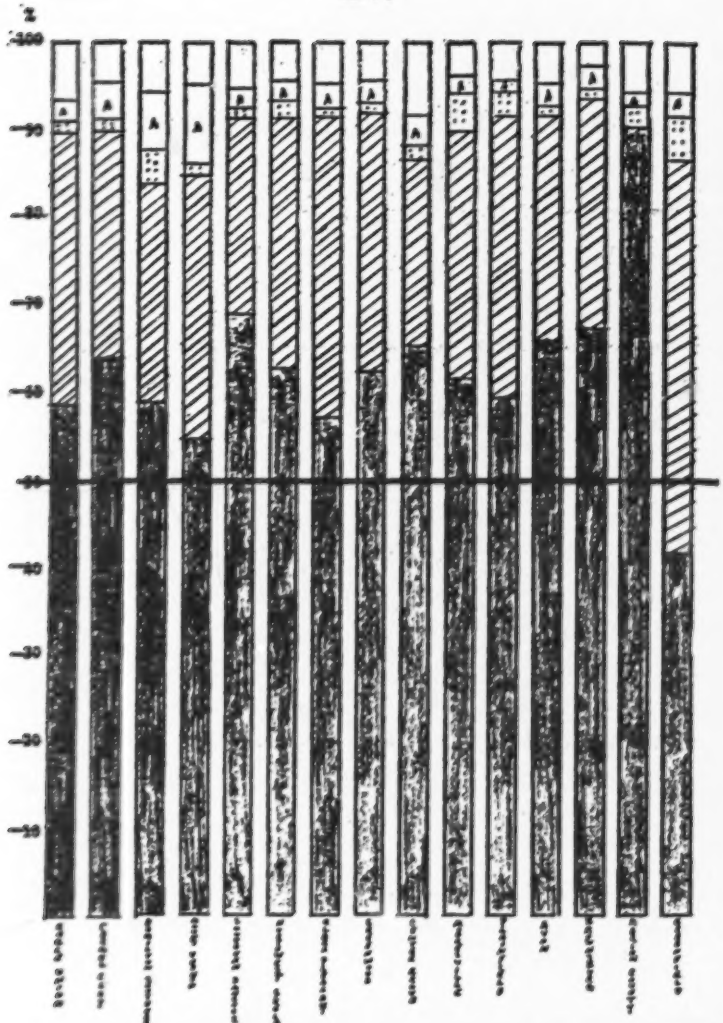
Percent of Negro Residents in Marion
County and Surrounding Townships
(Percent of Negro Students in School Systems)



County Boundary

Scale 0 1 2 3 4 5 (miles)

Fig. 5



Place of work of all workers living in Marion County, School Districts surrounding Marion County, and City of Greenfield. (Source: Plaintiffs' Ex. 37; Carmel-Clay Ex. FF)

Fig. 6

Fig. 7

Pupils Bused, 1971-72
(Other than Indianapolis)

	Pupils	Pupils Bused	% Bused
Boone			
Eagle-Union	1,738	1,293	74.39
Hamilton			
Hamilton-Southeastern	1,722	1,593	92.50
Carmel-Clay	6,196	4,115	66.41
Hancock			
Southern Hancock	1,895	1,722	90.87
Mt. Vernon	1,826	1,483	81.21
Greenfield-Central	4,156	1,733	41.69
Hendricks			
Avon	2,129	2,045	96.05
Plainfield	3,731	1,714	45.93
Brownsburg	3,333	2,198	65.94
Johnson			
Clark-Pleasant	2,738	2,533	92.51
Center Grove	2,920	2,754	94.31
Greenwood	3,383	2,766	81.76
Marion			
Decatur	4,706	4,304	91.45
Franklin	2,646	2,378	89.47
Lawrence	9,625	7,806	81.10
Perry	13,254	10,143	76.52
Pike	3,199	2,999	93.74
Warren	10,202	9,255	90.71
Washington	15,675	12,115	77.28
Wayne	12,652	11,175	88.51
Beech Grove	2,818	1,757	62.34
Speedway	2,482	0	0.00
Morgan			
Mooresville	3,959	2,286	57.74
Shelby			
Northwestern	1,867	1,832	98.12
Total	114,696	90,266	78.70%

Source: Reports A and F of
Plaintiffs' Exhibit 10

Cite as 368 F.Supp. 1191 (1973)

Marion County Township Populations 1940-1970

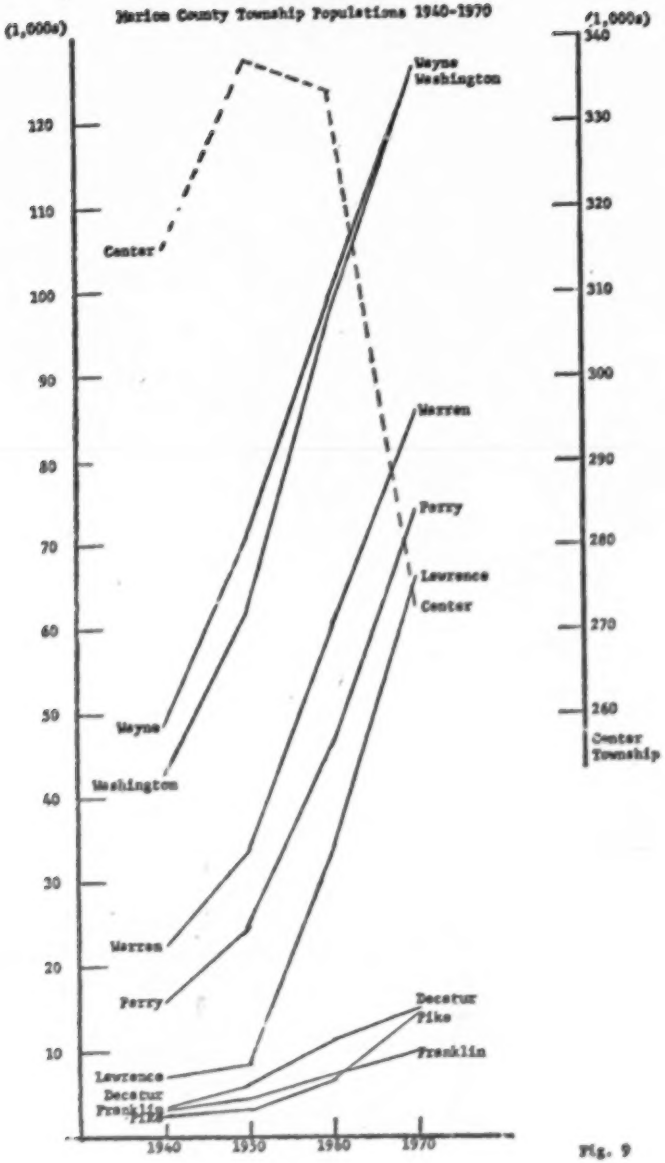


Fig. 9

Percent Increase in Population: Marion County Townships

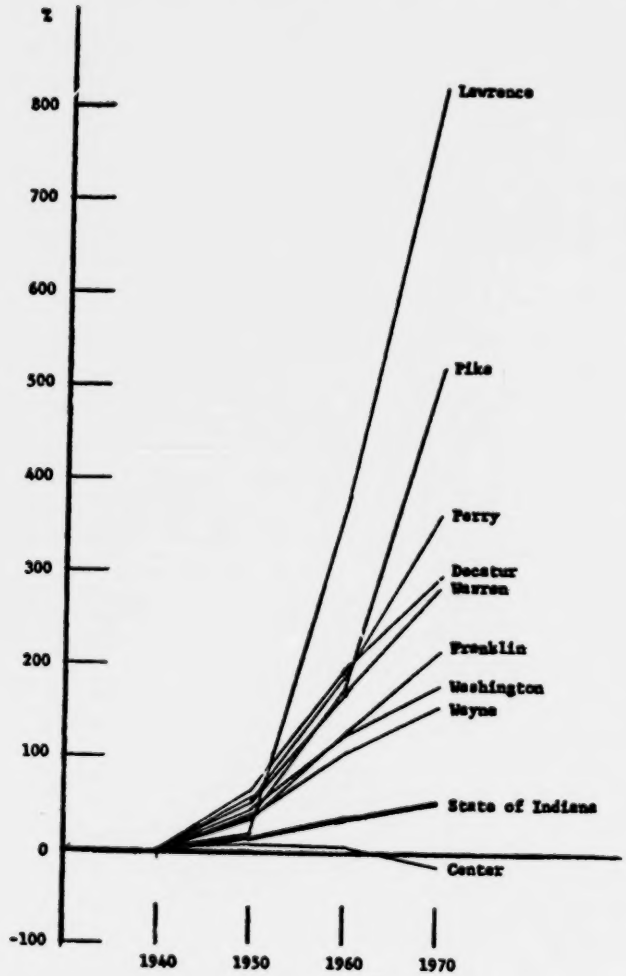
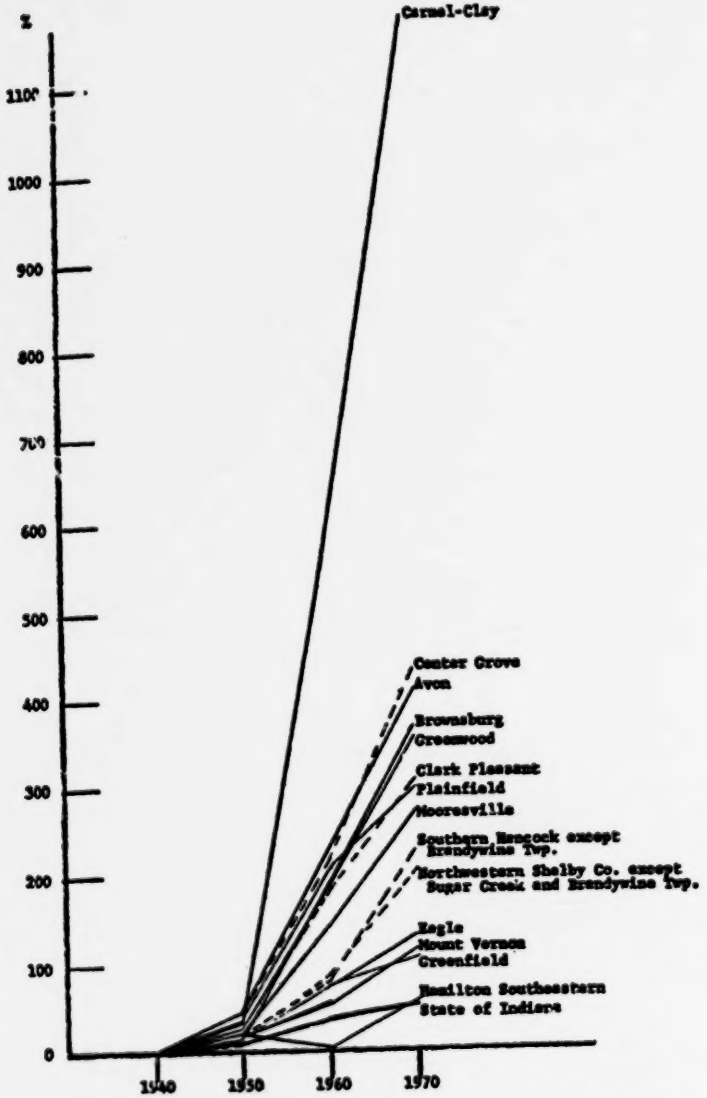


Fig. 10



Percent Increase in Population: Outside Marion County School Districts

Fig. 11

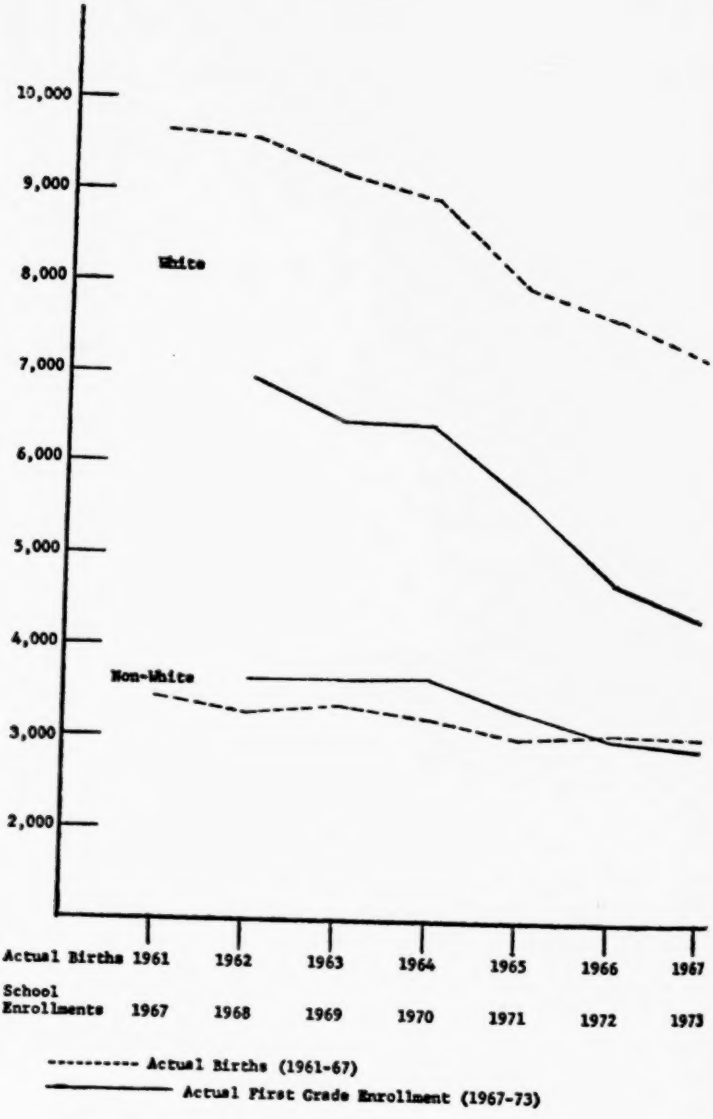

10,000
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
White
Non-White
Actual Births 1961 1962 1963 1964 1965 1966 1967
School Enrollments 1967 1968 1969 1970 1971 1972 1973
---------- Actual Births (1961-67)
Actual First Grade Enrollment (1967-73)

Fig. 12

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* DONNY BRURELL BUCKLEY, et al., *Intervening Plaintiffs,* v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	No. IP 68-C-225

SUPPLEMENTAL MEMORANDUM OF DECISION

I. *Introduction*

Heretofore, on August 18, 1971, the Court filed herein its Memorandum of Decision, incorporating its findings of fact and conclusion of law, and making certain interim orders, with respect to the issues presented by the complaint of the original plaintiff, United States of America, and the answer of the original defendants, The Board of School Commissioners of the City of Indianapolis, the individual members of such Board, and the Board's appointed Superintendent of schools. Such decision, which will be referred to hereafter as "*Indianapolis I,*" is reported in D.C., 332 F.Supp. 655, aff'd, 474 F.2d 81 (7 Cir. 1973), cert. den., 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).

Thereafter, on July 20, 1973, the Court filed herein a second Memorandum of Decision, incorporating its findings of fact and conclusions of law, and making certain interim orders, with respect to certain issues presented by the complaint of the original and added plaintiffs, Donny Brurell Buckley, et al. and the answers of the original and added defendants. Such decision will be referred to hereafter as "*Indianapolis II,*" is reported ante, p. 1191, 37 Ind.Dec. 524, and is now on appeal to the Court of Appeals for the Seventh Circuit, Nos. 73-1968 to 73-1984, incl.

The key decision made in *Indianapolis I* was that the Indianapolis public school system (hereafter "IPS") was being operated by the original defendants, and had been operated by their predecessors in office, as a system practicing *de jure* segregation of students of the Negro race. It was therefore held that the Negro students were being denied the equal protection of the laws, as guaranteed by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Certain interim measures tending to prevent further segregation were ordered, pending consideration of the questions to be presented and later decided in *Indianapolis II,* it being understood that the law required the defendants to take affirmative action to desegregate IPS. Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The key decisions made in *Indianapolis II* were that (1) as a practical matter, desegregation promising a reasonable degree of permanence could not be accomplished within the present boundaries of IPS, and (2) added defendant officials of the State of Indiana, their predecessors in office, the added defendant The Indiana State

Board of Education, and the State itself have, by various acts and omissions, promoted segregation and inhibited desegregation with IPS, so that the State, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to desegregate IPS.

The Court also held in *Indianapolis II* that IPS could be effectively desegregated either by combining its territory with that of all or part of the territory served by certain added defendant school corporations, into a metropolitan system or systems, and then reassigning pupils within the expanded system or systems thus created, or by transferring Negro students from IPS to added defendant school corporations, either on a one-way or an exchange basis. It further held that the State, through its General Assembly, should be first afforded the opportunity to select its own plan, but that if it failed to do so within a reasonable time, the Court would have the power and the duty to promulgate its own plan, and place it in effect. Bradley et al. v. Milliken et al, 484 F.2d 215 (6 Cir. 1973). See Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

By way of affirmative relief pending action by the General Assembly, the Court ordered IPS to effect pupil reassignments for the 1973-74 school year sufficient to bring the number of Negro pupils in each of its elementary schools to approximately 15%, which has been accomplished. The Court also directed IPS to transfer to certain added defendant school corporations, and for such corporations to receive and enroll, a number of Negro students equal to 5% of the 1972-73 enrollment of each transferee school, with certain exceptions. This order was, on August

8, 1973, stayed by the Court until the 1973-74 school year by an order made in open court but not previously reduced to writing.

At this time, certain matters have been presented to the Court, both formally and informally, which require further rulings in the premises. Such rulings are now made, as hereafter set out, as supplementary to or, in some instances, in lieu of rulings heretofore entered in *Indianapolis II*, as heretofore modified.

II. *The Question of a "Reasonable Time" for State Action*

[15] As stated, it was the Court's conclusion that the State should be afforded the opportunity, for a reasonable period of time, to discharge its affirmative duty to desegregate IPS. The question has arisen as to how long a time is reasonable.

As he Court knew judicially at the time it entered its decision in *Indianapolis II*, the General Assembly was scheduled to organize in November, 1973, for a session to begin in early January, 1974. It has so organized, and numerous bills have already been introduced—none, to the Court's knowledge, having to do with the subject at hand. As the Court also knows judicially, various legislative leaders have publicly announced that the coming session is expected to be short, and targeted for conclusion within a matter of a month or so.

Under the circumstances, considering the urgency of the problem presented, the fact that members of the General Assembly have had since July 20, 1973 to consider the problem, and the anticipated length of the coming legislative session, the Court considers a reasonable time within which the General Assembly should act to be the end of

its January, 1974 session or February 15, 1974, whichever date is sooner. The Court also considers that any legislation adopted by the General Assembly on the subject of the desegregation of IPS should be effective for the 1974-75 school year.

III. *The Duty of the General Assembly*

In its opinion in *Indianapolis II*, the Court pointed out in section IV thereof that the ultimate responsibility for the operation of all public schools in Indiana lies in the General Assembly, and that it has the undoubted power to desegregate IPS by appropriate legislation, citing the Indiana Constitution and some twenty cases decided by the Indiana Supreme and Appellate Courts. It also held that it was the General Assembly's duty to do so, based upon its findings from the evidence that it is not possible for the IPS School Commissioners to bring about a lasting desegregation within IPS boundaries.

[16] In reviewing that opinion, it now occurs to the Court that it perhaps placed undue stress on the General Assembly's power, and not enough on its duty; this failure of direction on the part of the Court may account for the General Assembly's seeming lack of attention to the problem to date, as the Court has no reason to doubt that the able members of that body will do their sworn duty to support the Constitution, once that duty is more clearly defined. By "sworn duty," the Court of course refers to the oath taken by each member of the General Assembly pursuant to Article 6, Clause 3 of the Constitution of the United States, which reads, in applicable part, as follows:

> "... (T)he Members of the several state Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be

bound by Oath or Affirmation, to support this Constitution;..."

As to what duty entails, in this instance, may be best ascertained by the guidelines laid down by the Supreme Court of the United States, whose decision and interpretations of the Constitution are final and binding on all citizens, including elected and appointed public officials, unless thereafter changed by that Court or by Constitutional amendment. Marbury v. Madison (U.S.) 1 Cranch 137, 2 L.Ed. 60 (1803). It is such guidelines which this Court has endeavored to follow to date in this rather difficult case—not because of any personal views of the Court, but for the simple reason that they constitute the law of the land, in every State and Territory, and the Court, pursuant to its own oath, may do no less. These guidelines, expressed in direct quotation from significant opinions of the Supreme Court, are as follows:

"Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does....

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place ... Plaintiffs ... are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. ..." Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (Brown I)

"... (T)he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance

areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. . . ." Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II)

". . . (T)he members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State. . .

* * * * *

"Article 6 of the Constitution makes the Constitution the 'Supreme Law of the Land.' . . . (T)he federal judiciary is supreme in the exposition of the law of the Constitution. . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown Case is the supreme law of the land, and Art. 6 of the Constitution makes it of binding effect on the States " 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. 6, cl. 3, 'to support this Constitution.' . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . ." Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958)

"Delays in desegregating school systems are no longer tolerable." Bradley v. School Board of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965)

"The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

* * * * *

"The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving de-

segregation. . . . The matter must be assessed in light of the circumstances present and the options available in each instance.

• • • • •

"'"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. . . . (I)f it fails to undo segregation, other means must be used to achieve this end.'" Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

"We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom of choice,' if it cannot be shown that such a plan will further rather than delay conversion to a unitary, non-racial, nondiscriminatory school system, it must be held unacceptable." Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968)

"Nearly 17 years ago this Court held, in explicit terms, that State-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. . . .

• • • • •

"The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. . . .

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

• • • • •

"The school authorities argue that the equity powers of federal district courts have been limited by Title

IV of the Civil Rights Act of 1964, 42 USC § 2000c. The language and the history of Title IV shows that it was enacted not to limit but to define the role of the Federal Government in the implementation of the Brown I decision. . . .

• • • • •

†'. . . The proviso in § 2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. . . .

• • • • •

". . . Bus transportation has been an integral part of the public education system for years. . . . Eighteen million of the Nation's public school children . . . were transported to their schools by bus in 1969-70 in all parts of the country.

". . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

"Thus the remedial techniques used in the District Court's order [pairing, busing, etc.] were [well] within that court's power to provide equitable relief. . . ." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 1971)

"As we have held, 'neighborhood school zoning' . . . is not the only constitutionally permissible remedy; nor it is per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiquous and noncontiguous attendance zones. . . .

The measure of any desegregation plan is its effectiveness.

"On the record before us, it is clear that . . . inadequate consideration was given to the use of bus transportation and split zoning. . . ." Davis v. Board of School Commrs., 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971).

"Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfilment of their constitutional obligation to eliminate dual school systems.

"Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . (T)he Constitution does not compel any particular degree of racial balance or mixing but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. . . .

"We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations. . . . (B)us transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971)

IV. *Guidelines of this Court—General*

[17] It is, of course, recognized by the Court that it cannot issue a positive order to the General Assembly to enact specific legislation. It is for such reason that the Court has suggested several different methods by which the General Assembly could approach the problem of effectively desegregating IPS, and it does not imply that there may not be other equally effective methods which may occur to that body.

Within the contest of what has been suggested as possible alternatives, however, the Court offers further observations, as follows:

(1) With respect to the concept of one metropolitan school district, embracing the area designated in Figure 1, attached to the Court's opinion in *Indianapolis II,* it is apparent that some advantages would be obtained from such a system. To name a few, a uniform tax base would be provided for the education of the more than 200,000 pupils in the combined system, and economy in operation could be achieved through central purchasing and reduction of administrative overhead. Complete desegregation would be simplified. On the other hand, it may be that such a system would be too large in terms of difficulty of administration and remoteness of the central office from school patrons.

(2) With respect to the concept of creating various new metropolitan districts—for example, six or eight to replace the present twenty-four pictured on Figure 1, it is apparent that some of the advantages above noted would be reduced, and some of the disadvantages improved. Another alternate, of course, would be to create one metropolitan system for taxing purposes, which in turn would be subdivided into several semi-autonomous local districts.

So long as IPS and the local districts are each effectively desegregated, the method used would be constitutionally immaterial.

[18] (3) With respect to the concept of permitting the present school corporations shown on said Figure 1 to remain as is, insofar as geography and control is concerned, such a solution would of course preserve local autonomy, and this Court would have no reason to disapprove such a solution, so long as each such corporation is required to participate in the desegregation of IPS. Put in other terms, local autonomy for such corporations is, under the law of Indiana, a privilege—not a right—all as discussed in detail in *Indianapolis II*. The consideration for permitting the various corporations to continue their separate existences might therefore be stated to be their participation in a meaningful plan to desegregate IPS. Some of the pertinent facts which the General Assembly may wish to consider in this regard are set out in the next two sections hereof.

V. *Transfer of Pupils*

When speaking of the transfer of pupils, the first logical question is as to the numbers involved. In this connection, the focus must be on the elementary schools within IPS which were not affected by the interim plan adopted by the Court for the present school year, and which have an enrollment of Negro pupils exceeding 80%. There are nineteen such schools, fourteen of which have Negro enrollments in excess of 97%. Two additional schools have enrollments exceeding 60%, and should also be considered. The total enrollment of black students in these 21 schools, excluding kindergarten and special education students, is approximately 11,500.

The General Assembly might order the exchange of all or a substantial part of these 11,500 students with students from the suburban school corporations. For purposes of illustration, if it were determined to desegregate such schools on the basis of approximately 85% white—15% black, then about 9,775 black children would need to be transferred to suburban schools, and about the same number of non-black children would need to be transferred to IPS.

There is case law to the effect that transfers of students must be made on an approximately equal basis insofar as the races are concerned, unless there is good reason why this should not be done. In such cases it has been held that to impose the "burden" of being transported wholly or largely upon students of one race is yet another form of racial discrimination and in violation of the Fourteenth Amendment rights of the group transported. United States v. Texas Education Agency, 467 F.2d 848 (5 Cir. 1972); Lee v. Macon County Board of Education, 448 F.2d 746 (5 Cir. 1971); Haney v. County, Board of Education of Sevier County, 429 F.2d 364 (8 Cir. 1970). Such cases, if followed, would seem to mandate so-called "two-way" busing, absent compelling reasons to the contrary.

The Supreme Court has not specifically addressed itself to this question. However, it is worthy of note that in McDaniel v. Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), that Court approved a desegregation plan adopted by the Clarke County (Ga.) Board of Education which reassigned pupils in five heavily Negro "'pockets'" to other attendance zones, busing many of them without any corresponding busing of whites. Other "one-way" busing plans have likewise been approved, depending on the factual setting. Hart v. County School Board, 459

F.2d 981 (4 Cir. 1972); Norwalk Core v. Norwalk Board of Education, 423 F.2d 121 (2 Cir. 1970). Indeed, the Fourth Circuit has flatly held that a pattern of assigning Negro students to formerly all-white schools, without requiring similar travel on the part of whites, does not violate the equal protection clause of the Fourteenth Amendment, Allen v. Asheville City Board of Education, 434 F.2d 902 (4 Cir. 1970). Moreover, analysis of the cases cited in the preceding paragraph indicates they have been decided on their particular facts, even though some of the language is in terms of absolute requirements.

The Court does not find it necessary to attempt to resolve this question in terms of constitutional absolutes, nor could it appropriately do so on the present record, since the question has not been squarely presented. However, the record does contain undisputed evidence that virtually all of the twenty-one IPS elementary schools above referred to (located as shown on Figure 13, attached) are substantially out of line with the requirements of present Indiana law and regulations establishing minimum acreage requirements for elementary schools. The regulations require seven acres for schools with 200 or less pupils, plus an additional acre for each additional 100 pupils or major fraction thereof. Burns' Indiana Rules & Regs., § (28-415)-3. As reflected in Figure 14, attached only one of these schools meets acreage requirements. Most schools are grossly deficient in the space required—for example, the pupil density at School 66 is 544.21 pupils per acre, and is 493.57 per acre at School 42 and 481.33 per acre at School 73. By way of comparison, the pupil density at School 42, taking into consideration its enrollment and the State formula, should be 57.58 pupils per acre. It is thus overcrowded by 857.18%!

The evidence further shows that, with a few exceptions, the twenty-one schools in question are among the older schools in the IPS system—some dating back 100 years, more or less. Although there is no evidence that the Board of School Commissioners has not maintained such schools as well as could be expected under the circumstances, it is a fair inference, subject to further proof, that the type of construction, use of flammable materials, etc., would fail by a wide margin to meet safety standards for newly constructed schools. On the other hand, the evidence discloses that the school plants maintained by added defendant school corporations are, for the most part, relatively new and in compliance with acreage and safety standards.

[19] On the basis of the foregoing facts, therefore, this Court would not feel justified in condemning out of hand a "one-way" suburban busing plan involving pupils from such of the twenty-one schools as may seem to the Board, on analysis, to afford inadequate educational plant facilities, viewed in the light of current standards. Additionally, such a plan would involve transportation of substantially fewer pupils, and therefore be less expensive.

Finally, unless convinced to the contrary by additional evidence in an appropriate hearing, this Court is not prepared to characterize busing as an unmitigated "burden." Although it might appear to a child to be "burdensome" to be derived of walking to school in the warm days of May and September (which presupposes that children do not like to ride in motor vehicles with their neighborhood friends—a somewhat novel concept to the Court), the Court doubts that it would seem such a burden to be transported in a heated bus through the rain, sleet, and snow so familiar in this latitude during other months of the school term. As pointed out in *Indianapolis II*, nearly 80%

of suburban pupils (more than 80% since the elimination of Greenfield) are bused to school at the present time, without complaint.

[20] The Court is not of the opinion that it would be wise to require transportation of kindergarten pupils, primarily because of their age, nor to transport special education pupils because of the various special problems which would inevitably arise in this regard. Further, the Court recognizes that special problems arise with respect to high school pupils, which might render their transfer counterproductive once their high school training has begun. As to pupils in grades 1-8, however, the Court knows of no reason why transfer of pupils, in whatever fashion the General Assembly may elect, would not be reasonable and practical to accomplish the constitutional duty imposed by the Supreme Court, with the understanding, of course, that a transferred elementary pupil would thereafter routinely continue to be transferred to the same transferee school corporation for continued education through high school.

If, for example, transfers were made of Negro pupils from those of the twenty-one schools failing to meet modern standards to the schools of added defendants situate within the geographical area depicted in said Figure 1, all of those transferred would be afforded education in a desegregated setting. It should be no great task to desegregate the remaining school or schools within IPS. The Court estimates, based on the statistics and projections in the record, that it would be necessary for the suburban schools within such Figure 1 area, excluding the Washington Township and Pike Township schools, to accept transfer of IPS elementary pupils in grades 1-8 in number equivalent to approximately 15% of their 1973-74 enrollments in the same grades in order to accomplish this result.

After such transfers were accomplished, the racial percentages in each school to which transfers were made would be approximately 87% white and 13% Negro—a ratio which, by coincidence, would approximate that of the nation as a whole. As regards Washington Township, its minority percentage as projected for the present school year is already this high, so that general 1-8 transfers to this defendant would not appear to be indicated; however, the acceptance of pupil initiated transfers from IPS to its Everett J. Light Industrial Center, to the extent that vacancies exist, might well be required. Pike Township likewise has a substantial minority percentage at this time; however, a number of transfers sufficient to increase such percentage to a figure approximating that of the other suburban schools should be considered.

VI. *Costs and Mechanics of Transfers*

One advantage of the dual transfer system would be that if approximately equal numbers of pupils were transferred to and from suburban schools, tuition, transportation, and other costs would balance out as between IPS and the various other corporations, and no additions to school plants would be necessary. On the other hand, more pupils would be transported, thus increasing this total cost, and such a system would continue the use of the IPS antique buildings and grounds.

[21] A one-way transfer plan would involve substantial tuition payments from IPS to the transferee schools. To the extent that such tuition applied only to the actual per capita cost of instruction, utilities, maintenance service, etc., no hardship would be imposed upon IPS, because it is apparent that IPS expense for such services would be correspondingly reduced. However, the present

transfer law, IC 1971, 20-8.1-6-1 through 20-8.1-6-15, as amended, Burns' §§ 28-5001 through 28-5015, also contemplates charges related to the fair value of the transferee school plant, tax levies for building purposes, and other items related to capital outlay of the transferee school. Considering that the State of Indiana is itself at fault in this matter, as previously found, the General Assembly should consider whether the State should be required to contribute the necessary amount to compensate the transferee corporations for the use of their respective plants. Such a provision, with an appropriate formula, could be adopted as an amendment to the existing transfer law.

It is possible that the General Assembly could discharge its duty in this matter simply by amending the existing transfer law. The purpose of such law, as the Court understands it, is to permit the better accommodation of school children. As pointed out in Section III hereof, the Supreme Court of the United States has held that for a minority child to be compelled to attend a segregated school denies the Fourteenth Amendment rights of such child: in effect, the child is not properly accommodated. Therefore, if the transfer law were amended to recognize transfers to accomplish desegregation of a school system which has been finally adjudged to have been segregated *de jure* (as is true in the case of IPS), a basis would be established for other necessary changes regarding time of payment of tuition, the share to be borne by the State, the matter of responsibility for and payment of the cost of transportation, and similar details. Since the actual number or percentage of pupils to be transferred is more of an administrative detail than a legislative function, this matter could be left to the discretion of the local school board or boards, subject to the approval of the court having jurisdiction of the case.

VII. *Vacation of Certain Previous Orders*

The various orders contained in *Indianapolis II,* and heretofore stayed by the Court, requiring certain transfers of pupils from IPS to added defendants are each vacated and set aside. It should be understood, however, that the reason for this ruling is simply that it would be inconsistent to permit such orders to stand, although stayed, inasmuch as the General Assembly, in the exercise of its discretion, may desire to adopt an acceptable plan which would be inconsistent with such orders.

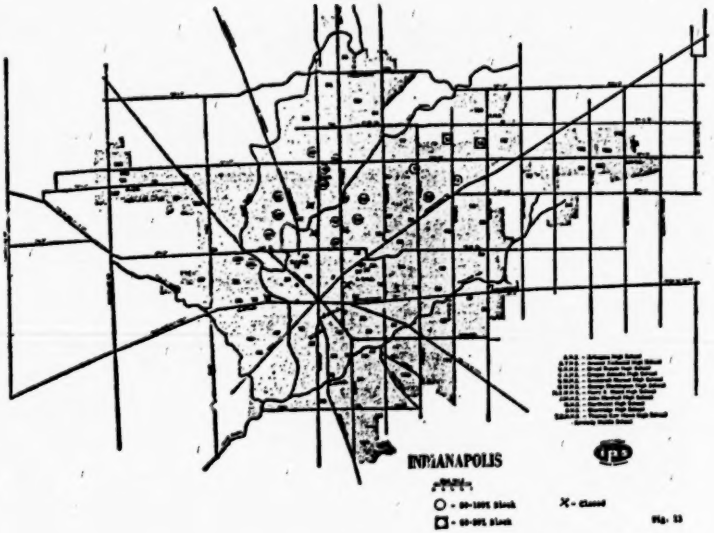
Moreover, the 5% order contained in *Indianapolis II* was designated as a mere interim order, it having been the Court's opinion that such amount of transfers would have been the most which could reasonably be expected to be accomplished within the limited time between the date of the order and the beginning of the 1973-74 school term. As it happened, added defendants were able to convince the Court that even this limited relief could not be accomplished within the time available, hence the stay. At this time the Court looks forward to a permanent solution to the problem of desegregating IPS, which will either come from the General Assembly, as it should, or from this Court in the event of legislative default. From what has been said herein, it should be apparent that the Court does not at this time consider 5% transfers as an adequate permanent solution. Indeed, if the solution is handed back to the Court by default, additional scrutiny will necessarily be given to complete consolidation along metropolitan lines.

[22] However, by vacating its previous orders, it is not the intention of the Court to render moot the appeals now being prosecuted by added defendants. To the contrary, the Court is of the opinion that its conclusions of

law as contained in *Indianapolis II*, as modified and supplemented herein, regarding the duty of the State to desegregate IPS, the State's power to adopt a metropolitan plan or transfer plan for such purpose, and the duty of the Court to promulgate such a plan in default of State action within the time presented, all involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from such rulings will materially advance the ultimate termination of this litigation. It is therefore respectfully suggested that the Court of Appeals determine said appeals on the merits, as provided in 28 U.S.C. § 1292(b).

Further, the Court in its previous order of July 20, 1973, *Indianapolis II*, entered the following: "All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation." This order was not, and is not stayed, and neither is it vacated. It therefore remains as a continuing and final order, operating against added defendant school corporations, and accordingly does not appear to be moot.

[See following illustration]



A	B	C	D	E	F	G
1	853	3.4	14	250.88	60.92	411.81
27	845	1.75	13	482.85	65.00	742.84
41	1157	3.0	17	385.66	68.05	566.73
42	691	1.4	12	493.57	57.58	857.18
43	811	2.6	13	311.92	62.38	500.03
44	1036	3.5	15	296.00	69.06	428.61
45	884	2.5	14	353.60	63.14	560.02
48	589	3.6	11	163.61	53.54	305.58
53	1068	10.0	16	106.80	66.75	160.00
56	655	1.7	12	385.29	54.58	705.91
60**	1152	2.9	17	397.24	67.76	586.24
63	383	1.5	9	255.33	42.55	600.07
66	1034	1.9	15	544.21	68.93	789.51
71	1274	8.2	18	155.36	70.77	219.52
73	1083	2.25	16	481.33	67.68	711.18
75	793	1.75	13	453.14	61.00	742.85
76	594	1.5	11	396.00	54.00	733.33
83	496	11.0	10	45.09	49.60	-9.10
110	1296	10.6	18	122.26	72.00	194.26
Ken.*	552	1.5	11	368.00	50.18	733.35

** School 60 and Mapleton-Fall Creek School

* Kennedy Middle School

A—Elementary Schools

B—September 1972 Enrollment

C—Acreage of School Site

D—Minimum State Required Acreage

E—Pupils Per Actual Acre

F—Pupils Per Minimum Required Acre

G—Percent Overcrowded

Fig. 14

United States District Court

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* DONNY BRURELL BUCKLEY, et al., *Intervening Plaintiffs,* v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	No. IP 68-C-225

ORDER

Heretofore, on August 20, 1973, the Court heard evidence in support of the interim plan for desegregation filed by the defendants Board of School Commissioners, et al, (hereafter "Board"), and upon the Board's motion for stay of execution of the Court's previous order of July 20, 1973 ordering the Board to take certain interim steps for the desegregation of its schools effective for the 1973-73[sic] school year. The Court also considered the written objections of the Buckley plaintiffs and of the original plaintiff, United States of America, in opposition to the adoption of the Board's proposed interim plan and to the board's request for a stay. The Court also considered the motion of the Buckley plaintiffs for the appointment of a commissioner or commissioners to draw up both interim and final plans for desegregation of the Indianapolis

Public School System because of the alleged failure of the Board to adopt constitutionally permissible plans despite the previous orders of the Court so to do.

Having considered the evidence, and having reviewed the Board's proposed plan and the objections thereto the Court made certain rulings from the bench, which are now reduced to writing in this order, *nunc pro tunc.*

It is considered, adjudged and decreed as follows:

1. The plan submitted by the Board is not in compliance with the order of this Court dated July 20, 1973 in various particulars, to wit:

(a) It does not purport to readjust the percentage of minority students in all of the elementary schools to a percentage approximating 15 percent.

(b) It does not make any provision for reducing the percentage of minority students at Shortridge High School, nor for increasing the percentage of minority pupils at Thomas Carr Howe High School, as previously ordered.

(c) Most importantly, the plan is in complete disregard of the Court's order of July 20, 1973 as to method of desegregating the elementary schools. That order, agreeable to the policy of the Supreme Court of the United States as enunciated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), required the Board to give first consideration to the changing of attendance zones, and to such devices as pairing and clustering before giving consideration to transportation of pupils. The Board's plan does not provide for the use of any of these Supreme Court approved devices.

2. The Board has been under the continuing orders of this Court to come forward with a feasible plan of desegregation for many months. On September 15, 1972 it was ordered to file such a plan by January 1, 1973, and at the Board's request the Court extended this time until February. On February 15, 1973 the Board filed what it called a "Stabilization Plan," which would have done nothing at all except to preserve the status quo, and thereby failed to compiy with such previous order of the Court.

3. When it filed its "Stabilization Plan." the Board suggested that other plans could be adopted as set out in its answers to interrogatories propounded by the United States. The other plans referred to did not purport to bring about the desegregation of the entire school system, but rather proceeded upon the incorrect assumption that only fourteen specified elementary schools required desegregation. In any event, the Board never adopted any of its alternative plans, hence therefore again failed to come forward with any plan for the Court's consideration other than the two plans herein found to be deficient.

4. Based upon the foregoing record, the Court finds, with regret, that the Board is unable or unwilling to comply with the orders of this Court, and that to continue to order it to come forward with workable and constitutional plans for desegregation would be an exercise in futility, leading only to further delay and public confusion.

5. In Swann v. Charlotte-Mecklenburg Board of Education, *supra,* the Supreme Court of the United States unanimously held in an opinion by Chief Justice Warren Burger that in instances when a Board is unable or unwilling to discharge its duty to come forward with a plan of desegregation meeting constitutional requirements after being given the opportunity to do so, it is within the power

of the trial court to appoint a commission or commissioner to accomplish such task. Indeed, the plan of desegregation unanimously approved by the Court in that case was the plan prepared by an expert appointed by the district court. The appointment of commissioners is therefore not novel, but simply follows the well known procedure heretofore authorized and approved by the Supreme Court of the United States.

6. The Court finds that a stay of its previous order of July 20, 1973 should not be granted for the reason that, as heretofore pointed out, the Board has had an ample opportunity to come forward with a constitutionally permissible plan and has failed to do so, and to grant a further stay would simply be to reward the failure of the Board to comply with the lawful orders of this Court. In this connection, it should be noted that the opinion of this Court of August 18, 1971, holding that the Indianapolis Public School System was segregated *de jure* was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit on February 1, 1973. 474 F.2d 81, cert.den. 41 L.W. 3669.

7. The Court finds that, agreeable to the holding of the Supreme Court in *Swann, supra,* commissioners should be appointed, as officers of the Court, to draw up interim and final plans for the desegregation of the Indianapolis Public School System, and the Court now names and appoints Dr. Charles A. Glatt and Dr. Joseph T. Taylor as Commissioners for such purposes.

8. The defendants are directed to cooperate fully with the Commissioners.

(a) Such cooperation will include, but not be limited to providing space at the headquarters of the Board of School Commissioners in which they may

work; paying all of their fees and expenses, as allowed by the Court; providing secretarial and stenographic assistance and the help of business machines, draftsmen and computers if requested, along with telephone and other communications services.

(b) The Commissioners shall have full access to maps, drawings, reports, statistics, computer studies, and all information about all phases of the school system which may be necessary to prepare plans or reports. They shall be supplied with any studies and plans and partial plans for desegregation of the schools which the defendants individually or collectively may have.

(c) The defendants will provide the Commissioners with full professional, technical, and other assistance which they may need in familiarizing themselves with the school system and the various problems to be solved in desegregating the schools and otherwise complying with the orders of the Court and the responsibilities assigned to the Commissioners. The cooperation of the school administrators and staff will be requested and will be appreciated.

(d) The Court finds, from previous testimony heard in this case, that the Board's staff assigned to school assignment problems is relatively small. It would be impractical and inefficient for this relatively small group of people to attempt simultaneously to carry out the directives and theories of the Commissioners in formulating a plan and at the same time to be required to devote attention to drawing up different and other plans calculated to meet the desires of the Board or of a majority of the Board. Therefore, until such time as the Commissioners may have com-

pleted their assigned tasks to the satisfaction of the Court, the defendants are ordered and directed to assign their professional planning staff wholly to the services of the Commissioners, except as the Commissioners or the Court may otherwise permit or direct.

9. Within the context of the foregoing, the Board shall have the right, and is invited (but not ordered) to continue to submit its own further plans for desegregation, if it desires to do so, and in any event all previous plans filed by the Board, except the "Stabilization Plan," will be given additional consideration by the Court along with any plan or plans submitted by the Commissioners in arriving at interim and final plans for the system.

10. At such time as the Commissioners shall have completed their draft of a proposed interim plan for the school year 1973-74, the same shall be furnished to the Board. The Commissioners, the Board and the administrative staff shall, if the Board so desires, forthwith meet in executive session, review the same together and discuss possible revisions suggested by the Board or staff. The final interim plan, as determined by the Commissioners, shall then be submitted to the Court for its review, along with the other plans above referred to and any additional plans which may be filed. Until such Commissioners' plan is put in final form after review with the Board and staff, the same shall be deemed a mere draft or work paper. All such drafts and work papers of the Commissioners shall be deemed confidential and such papers, and the contents thereof, shall under no circumstances be prematurely released, either directly or indirectly.

11. The Commissioners may, in their discretion, submit plans at different times for the elementary and secondary

schools, or submit partial plans deemed final, subject to the optional review provided in paragraph 10, in advance of the balance of such plans.

12. It appearing from the evidence heard during the trial which terminated in the Court's findings and order of July 20, 1973 that the establishment and implementation of a comprehensive Human Relations program is essential to the operation of desegregated school systems during the period of transition, and it further appearing that the Board is understaffed in this regard, and has made no application for available Federal funds for such purpose, the Board is ordered to proceed forthwith to make the necessary application or applications for Federal funds in all of the various categories available to school systems operating under orders of desegregation.

All of which is considered and ordered this 27th day of August, 1973, as of August 20, 1973.

/s/ S. HUGH DILLIN,

S. Hugh Dillin, Judge

United States District Court

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

DONNY BRURELL BUCKLEY, et al.,
Intervening Plaintiffs,

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants.

No. IP 68-C-225

ENTRY FOR AUGUST 30, 1973

On this date came the plaintiff, United States of America, by counsel, the intervening plaintiffs, Donny Brurell Buckley, et al, by counsel, and the defendants in person and by counsel. Came also the Commissioners heretofore appointed by the Court. Whereupon the following proceedings were had.

The Court appointed Commissioners (hereinafter "the Commissioners") presented to the Court their proposed interim plan for elementary student assignment (hereinafter "the plan"), a memorandum requesting that the Court grant certain exceptions to its previous orders, and a document entitled "The Quest for Human Dignity," all of which were ordered filed. The defendant Board of School Commissioners (hereinafter "the Board") filed written objections to the adoption of such plan.

The Court, having considered the plan, finds that the same appears sound and workable as to the elementary schools affected thereby and that the Commissioners have followed the guidelines of Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971), in arriving at the same. The Court therefore approves the plan, subject to the exceptions hereafter set out. In instances where the plan sets forth a first plan and then an alternate plan as to certain schools, the first plan shall be deemed accepted and approved, and the alternate plan shall be deemed rejected.

The Court is further advised, and finds, that the Commissioners have met with the Board, as directed, and that the Board and the Commissioners have, in good faith, discussed suggestions made by the Board, as a result of which the Commissioners have recommended certain exceptions to the Court's original order and guidelines, as follows:

1. That certain majority black schools be permitted to remain unchanged by this plan's design in the racial compositions of their student bodies until they later can be included in a final comprehensive plan;

2. That one elementary school specifically, Number 85, be exempted from any changes this year even though its projected enrollment of black students is slightly below the Court ordered minimum;

3. That the secondary schools remain unchanged this year in order that they may be included in the final comprehensive plan;

4. That transportation of kindergarten pupils will not be required.

It appearing that the Board and Commissioners are in agreement with respect to such exceptions, and there being

no objection from plaintiff or intervening plaintiffs, the same are allowed and approved.

It further appearing that the Commissioners have recommended that certain other suggestions made by the Board be taken into consideration by the Court, the Court now considers such suggestions, which are as follows:

1. That where legitimate transportational factors dictate, certain schools might not open initially as they are assigned by the plan. In those instances the students involved might first report to the school where they ordinarily would have been assigned without a desegregation plan, and reassignments to the schools recommended by the plan be permitted, not restricted precisely to but not to exceed six weeks from the opening of schools.

2. That for other compelling reasons deemed administratively necessary and approved by the Court appointed Commissioners, the Superintendent and his staff may choose to use a similar strategy for other students and other schools. If this is necessary, the same time constraints should prevail.

The Court notes that, to a large extent, adoption of such suggestions would meet many of the written objections filed by the Board to the adoption of the plan as not allowing enough time for its implementation prior to September 4, 1973, the date heretofore scheduled by the Board for the opening of school. Accordingly, the Court now adopts such suggestions, to the following extent:

1. In instances where detailed assignments of pupils have already been prepared, as in the case of Forest Manor Middle School, the same shall be effective on September 4, 1973.

2. In instances where such detailed assignments are not prepared, the same shall be prepared forthwith, and students directed to report to their newly assigned schools as soon as possible, but not to exceed six weeks after the opening of school. In the meanwhile, such students shall attend the school to which they would have been assigned but for the adoption of the plan.

3. Inasmuch as needed transportation facilities may reasonably be estimated, the procurement of such facilities shall not be deferred until all student assignments are made, but such procurement shall likewise proceed forthwith, to the end that such facilities shall be made available as needed.

4. The Board is directed to institute and put into operation, with the assistance of the Commissioners, programs designed to inform and advise parents and pupils of changes of direct concern to them, to acquaint such persons with their newly assigned schools, the programs therein, the advantages thereof, and otherwise to take such steps as are reasonable and prudent to relieve the natural anxieties incident to change, all to the end that necessary reassignments may be accomplished with as little friction as possible.

The Board's objections to the plan not herein adopted are necessarily overruled, as is its implicit request for a further stay. The Court has reconsidered the plans previously submitted by the Board, and finds the plan of the Commissioners to be superior thereto. To the extent that the Board's objections are specific, they have largely been met and acquiesced in by the foregoing orders of the Court.

The Court appreciates the cooperation of the Board in meeting with the Commissioners, and in making the constructive suggestions herein adopted. The Board may be

assured that its further suggestions will be given careful consideration, and it is invited to continue to make such suggestions.

/s/ S. HUGH DILLIN

S. Hugh Dillin, Judge

Copies to:

William C. Graves, U. S. Department of Justice
John O. Moss
John Preston Ward
Lawrence McTurnan

United States District Court

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS, DIVISION

UNITED STATES OF AMERICA, *Plaintiffs,* DONNY BRURELL BUCKLEY, et al., *Intervening Plaintiffs,* v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	No. IP 68-C-225

ENTRY FOR JUNE 11, 1973

Come now the parties, by counsel for pretrial conference pursuant to the Court's order of May 25, 1973.

The Court notes judicially that since the filing of their complaint by the intervening plaintiffs herein the Honorable Otis R. Bowen has succeeded the Honorable Edgar G. Whitcomb as Governor of the State of Indiana, and that the Honorable Harold H. Negley has succeeded the Honorable John J. Loughlin as Superintendent of Public Instruction of the State of Indiana. Accordingly the present holders of such offices are now substituted for their immediate predecessors as parties defendant herein.

Moreover, inasmuch as all defendants herein are sued in their official capacities, the action will be deemed as one against those persons currently holding the respective offices to which reference is made in the complaint, and the holders of such offices shall be deemed automatically

substituted for their predecessors as changes in such offices may occur from time to time.

The Court, having had under advisement the report of the defendants The Board of School Commissioners of the City of Indianapolis, suggesting to the Court the adoption of a plan of desegregation denominated by such defendants as the "Stabilization Plan," now disapproves such plan. The reason for such disapproval is that the "plan" simply recommends that no changes be made in existing elementary school district boundaries and high school assignment patterns as of the 1972-73 school year, thus resulting in no change whatever in the existing segregation in the School City of Indianapolis. Such a "plan" would not be constitutionally permissible.

The Court ruled that its previous judgment to the effect that the School City of Indianapolis maintains a school system which is segregated by operation of law is *res judicata,* and hence will be taken as a fact in the trial of further issues presented by the pleadings in this case without further proof.

The renewed motions of the defendants Otis R. Bowen, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, and Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana, as well as the renewed motions of the defendants School Town of Speedway and Carmel-Clay Schools for an order requiring the intervening plaintiffs to answer certain interrogatories are each overruled.

Dated this 11th day of June, 1973.

/s/ S. HUGH DILLIN

S. Hugh Dillin, Judge

Copies to All Attorneys of Record

A-118

TRIAL NOTICE

United States District Court

for the

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, *Intervening Plaintiffs,* VS. THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,	NO. IP 68-C-225

Entry for February 2, 1973
Honorable S. Hugh Dillin, Judge

It is ordered by the court that the above entitled cause be and the same is hereby assigned for trial by the Court on Monday, April 16, 1973, at 9:30 a.m., in the U.S. Dist. Court House, Indpls., Ind., in room 243. The trial will be limited to the issues formed on the amended complaint of the intervening plaintiffs, Donny Brurell Buckley and Alycia Marquese Buckley and the answers thereto.

Copy to:

Counsel of record.

A-119

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 72-1031

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana.

No. IP 68-C-225

S. HUGH DILLIN
Judge.

ARGUED SEPTEMBER 13, 1972—DECIDED FEBRUARY 1, 1973

Before KNOCH, *Senior Circuit Judge,* FAIRCHILD and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal from an order[1] by the district court finding that the Board of School Commissioners for the School City of Indianapolis, Indiana ("School City")[2] had been following a course of *de jure* segregation in violation of the holding of the Supreme

[1] The district court's Memorandum of Decision is set out in full as *United States v. Board of School Commissioners of City of Indianapolis, Indiana,* 332 F. Supp. 655 (S.D. Ind. 1971).

[2] The district court noted at 332 F. Supp. at 675-76 that by special act of the Indiana legislature the School City of Indianapolis is no longer coterminous with the civil or corporate city of Indianapolis. We draw no inferences from this fact.

Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) *(Brown I)*. On the basis of this finding, the district court determined as a conclusion of law that it had authority to convert to a unitary system.[3] The district court, as trier of fact, made detailed findings of fact to support the ultimate finding of *de jure* segregation and we shall not attempt to recapitulate those findings, except where specifically required. We do note however, that the court specifically found that (1) on May 17, 1954 (the date of the decision in *Brown I*), the School Board was operating a dual school system, that is, it was found to have had a "deliberate policy of segregating minority (Negro) students from majority (white) students," and (2) that the Board had not changed its policies so as to eliminate such *de jure* segregation on or before May 31, 1968 (the date on which the Government filed its complaint), 332 F.Supp. at 658.

Before turning to appellants' contentions, we first enunciate a few general principles on which the opinion of this court is based. In order to support a finding of *de jure* segregation, it is not necessary that there be a complete separation of the races. Certainly school systems totally segregated by force of a state law have been found to violate *Brown I*, but other districts in such segregation has been only partially effective (that is, in which there are some integrated schools) have been held to be equally in violation. *See Davis v. School District of City of Pontiac, Inc.*, 309 F. Supp. 734, 740 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971); *United States v. Board of Education, Independent School District No. 1, Tulsa County,*

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[3] The district court ordered interim relief and pursuant to *Brown v. Board of Education of Topeka*, 349 U.S. 294 (*Brown II*), retained jurisdiction to order further relief. In its brief, the School City questioned the specific interim relief regarding the Forest Manor Middle School, but that controversy was settled prior to oral argument.

Oklahoma, 429 F.2d 1253 (10th Cir. 1970). Further, the actions of the Board of School Commissioners and its duly-appointed representatives and agents may be sufficient to constitute *de jure* segregation without being based on a state law, or even if they are in derogation of state law forbidding segregation.[4] *See Keys v. School District No. 1, Denver, Colorado,* 445 F.2d 990 (10th Cir. 1971), *cert. granted,* 404 U.S. 1036 (1972); *Bradley v. Milliken,* —— F.2d —— (6th Cir., filed Dec. 8, 1972) (slip op. at p. 49-50).

Another principle which comes into play in examining the district court's opinion relates to the affirmative duty placed on a school board "to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board of New Kent County,* 391 U.S. 430, 437-38 (1968). This affirmative duty attaches to any school system guilty of *de jure* segregation at the date it became illegal under *Brown I,* May 17, 1954. Thus, we reject the distinction, proposed in the district court by the *amicus curiae,* between violation (initial, *e.g., Brown I*) cases and remedial (enforcement, *e.g., Brown* II) cases, for a court in a remedial case when it is considering what remedy to order looks to the same factors as it did when it determined that there was a violation of the mandate of *Brown I.* A school board, after years of *de jure* segregation, cannot blithely say that it has become "color blind" the day before a suit is filed and thereby avoid liability. As the Supreme Court recognized in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), not all "invidious racial distinctions" are

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[4] In 1949, the Indiana General Assembly passed an Act requiring desegregation on a phased basis, ending the official State policy of segregation, Acts 1949, ch. 186, p. 603; Burns Ind. Stat. Ann. §§ 28-6106 to 28-6112 (1970).

readily eliminated. It is in this sense clear that factors viewed as being reflective of *de jure* segregation in remedial cases would be similarly significant in the initial determination of whether or not there has been a violation of constitutional rights. It is in this way that remedial cases are relevant to the present case.

On this appeal, defendants basically present two arguments: first, that the district court erred as a matter of law in basing its finding of *de jure* segregation on the evidence of mere racial imbalance in the schools, and second, that the district court's finding that segregation resulted from the School Board's actions, and therefore was *de jure*, was clearly erroneous. Although the first point might appear to be subsumed in the second, there is a distinction between the two as the second assumes, *arguendo*, that the district court did not make the mistake claimed in the first point.

Appellants first assert that there is no constitutional duty to remedy the effects of racial imbalance or to maintain any particular racial balance in the public schools. The Government does not quarrel with this assertion, and, indeed, insofar as it relates to purely *de facto* segregation, *unaided by any state action*, it is the law of this circuit *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *aff'g* 213 F.Supp. 819 (N.D. Ind. 1963). The Board contends that since no student since *Brown I* has ever been compelled to go to a school because of his race nor denied admission to a school because of race, the racial imbalance presented in the record cannot support a finding of *de jure* segregation. In sum, appellants seek to portray this case as one of *de facto* segregation only, and argue that there is no duty to alleviate such racial imbalance which the Board did not cause. *Deal v. Cincinnati Board*

of Education, 369 F.2d 55 (6th Cir. 1966); *Bell v. School City of Gary, supra.*

The difficulty with this line of reasoning is that it does not comport with the findings of fact of the district court. As Judge Kiley has said for this court,

> "The weakness in this argument is that the district court did not find that defendants inherited an innocent de facto segregation situation, but found that they inherited from their predecessors a discriminatorily segregated school system which defendants subsequently fortified by affirmative and purposeful policies and practices which effectually rendered de jure the formerly extant de facto segregation. . . . This is not a case of mere 'inaction' under the court's finding of the unlawful actions of the Board." *United States v. School District 151 of Cook County, Illinois*, 401 F 2d 1125, 1131 (7th Cir. 1968).

The present case—in which, as will be discussed below, the district court found gerrymandering of districts, segregation of faculty, and other indicia of a dual system—stands in marked contrast to the *Deal* and *Bell* cases, above, where the district courts made specific findings of no such discriminatory practices by the boards.[5] Similarly, the present case is unlike *Banks v. Muncie Community Schools*, 433 F.2d 292 (7th Cir. 1970), where the court remarked that the record failed to disclose evidence of either racial motivation in board policies or a history of racial segregation from which such motivation might be inferred. Here, the district court commented extensively on both aspects in its opinion.

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[5] In *Bell*, there was a specific finding that there was no change in the school district boundary lines, and thus no gerrymandering. Also in *Bell* there were examples of black students being transferred from predominantly black schools to predominantly white schools to relieve overcrowding.

But appellants point to the language in the Supreme Court's opinion in *Swann, supra,* 402 U.S. at 24-25, which states that a particular racial balance is not necessary in each school and that one-race schools may be acceptable. They extrapolate from this that, since the only evidence before the trial judge was that of racial imabalance, the holding must be clearly erroneous, Rule 52(a), Fed. R. Civ.P. Our review of the record and the district court's opinion convinces us that this contention cannot be sustained. What the district court's opinion relates is a pattern of decision-making which it determined reflected a successful plan for *de jure* segregation. Although it might not be possible to infer the requisite discriminatory intent from any one instance or example in the record, it is clear that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents. See *Davis v. School District of the City of Pontiac, Inc.,* 443 F.2d 573, 576, (6th Cir. 1971).

The appellants deny any conscious motivation on the part of their predecessors or themselves to foster, or even continue, segregation policies in the school system; however, in examining that which was in existence at the time of *Brown I* and that which transpired thereafter, the courts are not precluded from drawing the normal inference of intent from consciously consummated acts. Intent, in this sense, may or may not be consistent with expressed motivation.

There is no doubt that the statistics as to the extreme racial imbalance in various schools, especially those schools previously segregated by state law until 1949, was one of the factors which the district judge considered. But even though no particular racial balance is *per se* neces-

sary, *Swann* does not say that such imbalance may not be considered as one factor from which the district court may infer a segregatory intent.

Inasmuch as our review of the district court's order, as discussed hereinafter, reflects that the racial imbalance was only one factor considered by the district court, we reject appellants' first contention that the finding of *de jure* segregation was based merely on evidence of racial imbalance.

The Board also rests its case on the alleged mistake of the district court in inferring *de jure* segregation from various acts which encouraged racial imbalance in the schools. It argues that these underlying findings of fact are clearly erroneous insofar as they place the blame for the present system's racial imbalance on actions taken by the Board and its agents. To show *de jure* segregation, rather than *de facto* segregation, the Government must show improper intent and causation. Throughout the trial and in its brief in this court, the Board emphasized not only its lack of intent, but also that the schools which are predominantly or completely black would have become so no matter what the Board did as long as it maintained some policy approximating that of a neighborhood school system. It is to these contentions that we now turn.

Initially, we must consider appellants' contention that they have adhered nondiscriminatorily to a policy of neighborhood schools. We are, of course, limited by the fact that we can only set aside the district court's findings if they are clearly erroneous, Rule 52(a), Fed. R. Civ. P., and cannot substitute our "findings" for those of the district court, *Northcross v. Board of Education of the Memphis, Tennessee, City Schools,* 397 U.S. 232, 235 (1970), as requested by appellants in oral argument, even

though much of the record is documentary.[6] We also note that appellants are most strenuous in their denial of any present discriminatory activity, leaving the actions of the 1950's as little more than ancient history with minimal or no probative value for this case. At this point, we need only note that most of the practices and policies discussed below were present in May of 1954 and that the evidence of both segregatory intent and causation is substantial enough to support the district court's findings. Further, as noted above, the fact that the Board's predecessors were guilty of unlawful segregation after *Brown I* does have an impact on the Board's case today. It placed the Board thereafter under an affirmative duty to eliminate all vestiges of the dual system.

The district court made detailed findings regarding a number of practices which it considered supported the ultimate finding of *de jure* segregation. Perhaps the most extensive finding related to gerrymandering of school attendance zones within the allegedly neutral framework of the neighborhood school system. In the Board's initial set of neighborhood boundary lines, the district court found,

> "[they] were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools." 332 F. Supp. at 666.

Our examination of the record shows this finding to be supported by substantial evidence. Most characteristic is

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[6] There were over 190 exhibits introduced into evidence by the parties, many with multiple sub-parts. Yet, it would be inaccurate to say that the documentary evidence was all that was involved since the trial lasted several days, with the transcript covering over 2000 pages if three definitions admitted into evidence are included.

the district carved out of School 64 which exactly covers a small enclave of blacks on the southeast side of Indianapolis. That it was easy for the Board to superimpose these geographical limitations on the patterns of residential discrimination discussed by the district court does not make the congruency of housing and school boundaries inevitable. It was just such a use of boundary lines to lock in previous segregation which was, condemned in *United States v. School District 151, supra,* 404 F.2d at 1132, and *United States v. Board of Education, Tulsa County, Okla., supra,* 429 F.2d at 1255 and 1259.

This questionably fortuitious superimposing of boundary lines was highlighted by the district court when it alluded to the inconsistent application of the generally accepted principles for drawing zones for neighborhood schools, thereby increasing racial imbalance, 332 F. Supp. at 666, n.54. Such evidence was considered probative of the existence of a dual school system in *United States v. Board of Education, Tulsa County, Okla., supra,* 429 F.2d at 1256. On the whole, we think that the record is clearly sufficient to support a finding of gerrymandering of school boundary lines. Certainly, we are unable to say that the finding is clearly erroneous. Once again, it is not any one specific change which would allow a court to find such a fact, but the pattern and practice from which the court could infer the impermissible occurrence.[7] *Cf. Downs v. Board of Education of Kansas City,* 336 F.2d 988 (10th Cir. 1964). The district court in the present case rejected similar explanations raised by appellants, at least as to some of the changes, and we cannot say that this finding

[7] The most graphic example of such gerrymandering is found in the feeder schools chosen to send students to all-black Crispus Attucks High School in 1954, the year *Brown I* was decided, and continued for years thereafter.

is clearly erroneous on the record before us. We agree with the court in *Keyes v. School District No. 1, Denver, Colorado, supra,* 445 F.2d at 999, that "we can perceive no rational explanation why state imposed segregation of the sort condemned in Brown should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers." See also *United States v. Jefferson County Board of Education,* 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir. 1967).

In support of the finding of a policy of gerrymandering school boundaries was the use of optional attendance zones discussed by the district court at 332 F.Supp. at 668. Although the Board asserted a variety of explanations for these optional zones, there is no doubt that its effect was to allow whites in racially mixed neighborhoods to choose to attend a "white" school and blacks to attend a "black" school. There was testimony in the record as to informal practices of encouraging low achievers and problem students who were black to go to all-black Crispus Attucks High School. This practice was identical to one condemned in *Smuck v. Hobson,* 408 F.2d 175, 183 (D.C. Cir. 1969), *aff'g Hobson v. Hansen,* 269 F. Supp. 401 (D.D.C. 1967). Moreover, since the optional attendance zones in the present case were superimposed upon a system with a substantial history of state-enforced segregation, we find particularly applicable those cases which have questioned freedom-of-choice plans as a means for eliminating *de jure* segregation.

In *Green v. County Board of New Kent County, supra,* and *Raney v. Board of Education of the Gould School District,* 391 U.S. 443 (1968), the Supreme Court, although not holding freedom-of-choice plans to be unconstitutional

per se, stressed that they were not always an effective way of desegregating a dual system, and, in fact, might serve only to perpetuate separation of the races by placing the burden for desegregation on the children and their parents rather than on the school board where it belonged. If we follow the Supreme Court's mandate in *Monroe v. Board of Commissioners of the City of Jackson,* 391 U.S. 450 (1968), and look at the effect of the free transfer plan on the school system, then it becomes quite clear that the district court's disapproval of these optional attendance zones was not clearly erroneous.

Further reinforcing the district court's opinion was the stipulated fact that "it had been the general policy and practice of the defendants and their predecessors in office . . . to assign teachers (including substitute teachers) and staff members to schools, . . . so that, in general, the faculty and staff of each school mirrored the racial composition of the school's student body." Such a practice was condemned by the court in *Davis v. School District of the City of Pontiac, Inc., supra,* 443 F.2d at 574 and 576. But more significantly, the practice was impliedly condemned by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 18: "Independent of school assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." The fact that after the Government initiated this suit the Board of School Commissioners by stipulation agreed to eliminate this policy and assign teachers on a nonracial basis under court supervision will

be discussed hereinafter. At this point, we only note that as of 1968, substantial faculty segregation (to match the student segregation—whether *de jure* or *de facto*) was the admitted policy of the Indianapolis school system.

The district court also referred to Board practice concerning construction of additions to existing schools and temporary transportation of students when there was overcrowding prior to any permanent resolution of a given situation, 332 F. Supp. at 667-668 and 669. Further, the court noted that the construction of new schools fitted into a pattern of promoting racial imbalance and isolation, 332 F.Supp. at 668-669. Once again, the general finding of fact as to intent made by the district court is a permissible inference from the evidence presented by the record. There were several instances cited in which additions were built to adjoining schools of opposite racial makeup rather than building a new school between them which would have had a racially mixed student body. It was a similar pattern of construction of additions to existing schools on which the court relied in part in finding *de jure* segregation in *United States v. Board of Education, Tulsa County, Okla., supra*, 429 F.2d at 1256. In addition, the placement and usage of junior high schools was stressed by the Government in its case in chief. In those examples, certain intermediate grade pupils were put into junior high schools with the pupils coming from elementary feeder schools basically of one race makeup even though another elementary school not used for feeding, containing basically pupils of the opposite race, was as close to the junior high school and often was more overcrowded than the feeder schools.

With respect to the district court's findings on the Board's choice of sites for new schools, of particular inter-

est is the fact that the two newest high schools have been constructed in the furthest extremities of the School City, as far as possible from the center city black areas. Although the construction of schools to service these rapidly developing areas was indeed necessary, their location at the most distant points of the School City apparently was viewed by the district court as one further fact from which it inferred a segregatory intent, an inference which we cannot say is clearly erroneous on the record as a whole. As this court said in *United States v. School District 151, supra,* 404 F.2d at 1133, "it does not follow from the absence of a duty to achieve racial balance that a Board may deliberately select sites to achieve racial segregation." Nor, we will add to the foregoing statement, may a Board deliberately but unnecessarily select sites the obvious result of which is the achievement of racial segregation.

Similarly, the Chief Justice's opinion in *Swann v. Charlotte Mecklenburg Board of Education, supra,* 402 U.S. at 20-21, emphasized that construction of new schools was one of the most potent weapons in maintaining a segregated school system, both by constructing new schools in white suburban areas far from black residential areas, thus allowing racial separation without significant departure from the often enunciated principles of "neighborhood schools," and by promoting further residential segregation by denoting specific areas as white or black. See also *United States v. Jefferson County Board of Education, supra,* 372 F.2d at 876.

From the above, we conclude that the findings of the district court are not clearly erroneous, that, in fact, the factors cited by the judge to support the ultimate finding are relevant and significant considerations, not only in our opinion, but also in the opinions of various courts

which have dealt with similar cases, and that the inference as to the improper intent which the judge drew from the patterns he saw was proper. As to this last point, we can only emphasize that there are very few cases of school segregation today in which the defendants admit that they had an improper intent. Such intent may then be properly inferred from the objective actions. The district court's opinion refers not only to specific examples but also to aggregate findings: for example, the court stated, "according to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation." 332 F.Supp. at 670. See *Keyes v. School District No. 1, Denver, Colo., supra*, 445 F.2d at 1000. There is substantial evidence to support the inference.[8]

There is one further contention raised by appellants that we must consider. As noted above, appellants denied both that they had a segregatory intent and that their actions were the proximate cause of the present severe racial imbalance in many of the schools in Indianapolis. The Board argued that whatever patterns of *de jure* segregation existed in the past, today's segregation was *de facto*, if that. Therefore, it is argued, nothing the Board could have done would have prevented such a situation from occurring unless it had rejected the concept of neighborhood schools altogether, something which the courts have not required in the absence of *de jure* segregation. This contention is not easily answered since, as the district court's opinion reflects, other forces both public and private have had significant impact on residential housing

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[8] We note that such inferences are not unique to this area of the law. The doctrine of "conscious parallelism" in antitrust law involves a similar inference of intent from objective factors. See *Antitrust Developments, 1955-1968*, at 22-24. See also *Littleton v. Berbling*, No. 71-1395, ... F.2d ... (7th Cir., filed October 6, 1972) (slip op. p. 29).

patterns in Indianapolis. Arguably, *Brown I* and *Brown II* would still reach such conduct even if the result was clearly inevitable. But we can add that in the present case we believe that the district court's finding is not clearly erroneous when it lays at least a substantial part of the blame on defendants and their predecessors and agents. The Supreme Court in *Swann*, as well as many other courts, has recognized that school policy has a substantial impact on residential patterns as well as vice versa. Thus, the appellants are not the victims of the inevitable since their predecessors' actions have contributed in substantial part to the present pattern. Furthermore, even the appellants cannot successfully argue that the marginal cases in racially mixed areas are inevitable. Those schools which might have racially mixed enrollments today but due to the practices found by the district court are either predominantly white or predominantly black are clearly within the Board's responsibility. Finally, it would be improper to allow the Board to follow policies which constantly promote segregation and then defend on the *presumption* of inevitability.

A related consideration is found in appellants' protestations that they have in the last several years taken substantial steps to correct any possible inequities inherited from their predecessors in office. The district court's opinion shows, however, that even after the date the suit was filed, defendants continued in some of the patterns which the court found to be segregatory. Even giving the appellants the benefit of all doubts as to the last few years, we would agree with the court in *Davis v. School District of City of Pontiac, Inc., supra*, 443 F.2d at 575: "However, these same contentions were presented at trial and the District Court, while acknowledging recent efforts to improve the situation, nevertheless found the new policies inadequate

to cure the effects of years of purposeful segregation." Especially as to actions taken after the date on which the suit was filed,[9] as praiseworthy as they may be, such actions go more to the proprietary of granting equitable relief, rather than to the merits of the district court's findings. We might also note that since 1968, when this suit was filed, the Board has rejected a plan of desegregation propounded at the Board's request by a team of educators from the Office of Education, Department of Health, Education and Welfare. Although there was certainly no requirement that the Board accept the proposal, the unqualified rejection of a similar plan was found to be probative of an improper intent in *United States v. School District 151, supra,* 404 F.2d at 1133.

In sum, this case was tried to a judge who obviously gave it considerable conscientious thought and attention and by able counsel on both sides. We have examined the court's findings of fact and are unable to say the findings are clearly erroneous that during much of the period from 1954 to 1968 the Board continued affirmative policies which promoted a dual system, and that last-minute efforts have been totally insufficient to eliminate the consequences of those years of discrimination. Since the district court's findings of fact are not clearly erroneous, and since the court correctly stated the law based on those findings, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

[9] The integration of Crispus Attucks High School, the desegregation of faculty appointments, and the majority to minority tranfer program were adopted only after this suit was filed.

United States District Court

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	
DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, *Intervening Plaintiffs,*	
VS.	
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants,*	NO. IP 68-C-225
EDGAR D. WHITCOMB, AS GOVERNOR OF THE STATE OF INDIANA, et al., *Added Defendants.*	

ENTRY

The Court, having had under advisement various motions of the parties, and being fully advised, now makes the following rulings with respect thereto:

1. Certain motions filed by various parties defendant are each separately and severally overruled, as follows:

a. All motions to dismiss the amended complaint of the intervening plaintiffs.

b. All motions to sever and docket separately the amended complaint of the intervening plaintiffs.

c. All motions to stay proceedings on the amended complaint of the intervening plaintiffs pending the

decision on appeal of the Court's judgment of August 18, 1971.

d. All motions for a more definite statement of the amended complaint of the intervening plaintiffs.

e. All motions requesting abstention on the part of the Court.

f. All motions to strike the amended complaint of the intervening plaintiffs.

g. All motions for determination that the cause of action stated in the amended complaint of the intervening plaintiffs is not maintainable as a class action.

2. The motion of the intervening plaintiffs for an order requiring that service be made of all pleadings by all parties defendant on counsel for intervening plaintiffs who reside without the District is granted, and it is so ordered.

The Court recognizes that the main thrust of the added defendants' various motions to dismiss the intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. This position is valid. Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the Court entered before joinder of the added defendants.

The Court, not being fully advised on the issue of whether or not a three-judge Court is required herein,

will continue such matter under advisement. In this connection, the intervening plaintiffs are directed to file their brief in response to such motion on or before January 24, 1972.

Dated this 30th day of December, 1971.

/s/ S. HUGH DILLIN

S. Hugh Dillin, Judge

United States District Court

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
U.S. District Court
Indianapolis Division
Sep 14 3:30 PM '71
Southern District
of Indiana
Arthur J. Beck
Clerk

UNITED STATES OF AMERICA, *Plaintiff,*	)	
vs.	)	No. IP 68-C-225
BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al., *Defendants.*	)	

ORDER ON PETITION TO INTERVENE

This cause came before the Court on the petition of DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY to intervene in this action as party plaintiffs in their own right and as representatives of a class comprised of Negro school age children residing in Marion County, Indiana, who have attended or are attending segregated schools.

The petition alleges that the interest of the plaintiffs and the class they seek to represent are not adequately

represented by the plaintiff United States of America which, the petition alleges, has failed to prosecute this action against certain school districts and governmental agencies and authorities against who relief is required to redress petitioners' deprivation of equal protection of the laws.

The Court notes that on September 7, 1971 the United States, pursuant to order of the Court, moved to add certain additional school corporations as parties defendant. However, the United States failed or refused to assert or allege any claims against such added defendants, as to which they could reasonably be expected or required to respond, or which would frame the legal issues whose resolution requires the presence of such additional parties.

The complaint of the intervening plaintiffs furnishes an orderly framework for the parties to address themselves to such legal issues. Furthermore, since the questions raised by intervening plaintiffs' complaint, or flowing therefrom, are essentially legal in character and affect all members of the class equally, the court finds that a class action is superior to other methods for the fair and efficient adjudication of this matter.

It is therefore ORDERED:

1. That the petition to intervene be and the same is hereby granted, and the complaint in intervention is ordered filed instanter.

2. That the action of the intervening plaintiffs be maintained as a class action, and that notice thereof be given to members of the class as the Court shall hereafter order. This order shall be conditional subject to alteration or amendment as circumstances may require.

3. That the clerk issue summonses to the defendants named in the complaint in intervention, and that the United States Marshall serve such summonses and complaints upon said defendants at the cost and expense of the United States, and make his due return thereon.

Dated this 14 day of September, 1971.

/s/ S. HUGH DILLIN

S. HUGH DILLIN
United States District Judge

Certified: A True Copy
Arthur J. Beck, Clerk
U. S. District Court
Southern District of Indiana

By _____
Deputy Clerk

United States District Court

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
U.S. District Court
Indianapolis Division
Sep 14 2:31 PM '71
Southern District
of Indiana
Arthur J. Beck
Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No.IP 68-C-225
	)	
BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,	)	
	)	
	)	
Defendants.	)	

MOTION TO INTERVENE AS PARTY PLAINTIFF

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, by Counsel, move for leave to intervene as party plaintiffs in this cause, for the purpose of asserting the claims set forth in the complaint in intervention which is attached hereto as Exhibit "A".

Petitioners are Negro Children residing in Center Township, Marion County, Indiana, attending Indianapolis Elementary School No. 42, within the School City of Indianap-

olis, by virtue of which petitioners have an interest in the subject matter of the pending action. Petitioners seek leave to intervene in their own right and as representatives of a class comprised of Negro school age children residing in Marion County, Indiana, who have attended or are now attending segregated schools. The interest of petitioners and the class they seek to represent are not adequately represented by the existing plaintiff United States of America in that such plaintiff has failed to prosecute this action against school districts and governmental agencies and authorities other than the Board of School Commissioners of the City of Indianapolis, and relief against such school districts, governmental agencies and authorities, as prayed for in the attached complaint, is necessary to redress petitioners deprivation of equal protection of the laws.

/s/ JOHN O. MOSS

JOHN O. MOSS
Attorney for Petitioners
156 E. Market #902
Indianapolis, Indiana 46204
635-1945

A-143

United States District Court

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

FILED
U.S. District Court
Indianapolis Division
Sept 14 2:46 PM '71
Southern District
of Indiana
Arthur J. Beck
Clerk

UNITED STATES OF AMERICA,
Plaintiff,

DONNY BRURELL BUCKLEY, et al.,
Intervening Plaintiffs,

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants.

No. IP 68-C-225

COMPLAINT IN INTERVENTION

Count I

Intervening plaintiffs, for this cause of action, alleges:

1. Intervening plaintiffs, are Negro Children, age ten (10) and eight (8), residing in Center Township, Marion County, Indiana, and attending School #42, an elementary school within the School City of Indianapolis, which is governed, managed and controlled by the defendant Board

of School Commissioners of the City of Indianapolis, pursuant to the authority delegated to it by the State of Indiana. Intervening plaintiffs bring this action on behalf of themselves and members of their class generally, comprised of Negro school age children residing in Marion County, Indiana, who as a result of past and present discrimination policies of the defendant school corporations and of the State of Indiana have in the past attended or are now attending segregated and inferior schools.

2. Defendants Board of School Commissioners of the City of Indianapolis; Metropolitan School District of Washington Township, Metropolitan School District of Lawrence Township; Metropolitan School District of Warren Township; Franklin Township Community School Corp.; Metropolitan School District of Perry Township; Metropolitan School District of Decatur Township; Metropolitan School District of Wayne Township; Metropolitan School District of Pike Township; School Town of Speedway; and Beech Grove City Schools, are all common school corporations organized and existing under the laws of the State of Indiana with geographical boundaries within Marion County, Indiana and acting as agents of the State of Indiana to fulfill the duty imposed upon it by the state constitution to provide for a general and uniform system of common schools.

3. This Court has jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3), and under the Fourteenth Amendment to the Constitution of the United States.

4. The maintenance and operation of separate school corporations within Marion County, Indiana has resulted in the maintenance and perpetuation of racial discrimination in the public schools of Marion County, Indiana in violation of intervening plaintiffs' rights under the Four-

teenth Amendment to the Constitution of the United States and Article VIII section I, of the Constitution of Indiana.

5. Section 314 of Chapter 173 of the Acts of 1969, Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), which chapter is known as the "Consolidated First Class Cities and Counties Act" is unconstitutional and void insofar as its purports to exempt from the scope and effect of said act the consolidation of all school corporations within Marion County, Indiana. The purpose and effect of such exemption, as further implemented and enabled by the provisions of Chapter 186 of the Acts of 1961, Burns Ind. Stat. Ann. § 28-2338 to 28-2347 (1968 Cum. Supp.) and Chapter 52 of the Acts of 1969, Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.) has been and is to perpetuate segregation and to inhibit desegregation in the public schools of Marion County.

WHEREFORE, intervening plaintiffs pray that the Court adjudge and declare that Chapter 186 of the Acts of 1961, Chapter 52 of the Acts of 1969 and Section 314 of Chapter 173 of the Acts of 1969 are unconstitutional and void, and that the boundaries of the School City of Indianapolis are coterminous with the boundaries of the Civil City of Indianapolis and for such other and further relief as may be appropriate.

Count II

Intervening plaintiffs, for their second cause of action, allege:

1. They reallege and incorporate herein by reference the allegations of paragraphs 1, 2 and 3 of Count I.

2. Defendants Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corp., Hancock

County, Indiana; Greenfield Central Community Scho Corp., Hancock County, Indiana; Greenwood Communi School Corporation, Johnson County, Indiana; Moore ville Consolidated School Corporation, Morgan Count Indiana; Plainfield Community School Corporation, Hen ricks County, Indiana; Avon Community School Corpor tion, Hendricks County, Indiana; Eagle-Union Communit School Corporation, Boone County, Indiana; and Brown burg Community School Corporation, Hendricks Count Indiana, are all common school corporations organized an existing under the laws of the State of Indiana and actin as agents of the State of Indiana to fulfill the duty impose on it by the state constitution to provide for a general an uniform system of common schools. Such school corpora tions, along with the defendant school corporations name in paragraph 2 of Count I have geographical which fal within the Indianapolis Metropolitan Statistical Area a recognized and defined by the Bureau of Census. The boun daries of each school corporation enumerated in this para graph include townships of counties adjacent to Marion County, Indiana which are contiguous to Marion County.

3. Defendant John L. Loughlin is Superintendent of Public Instruction of the State of Indiana and in that capacity is charged by law with the administration of the system of public instruction and general superintendence of the business relating to the common schools and obli gated to carry into effect the public policy of the State of Indiana to provide, furnish and make available equal, nonsegregated, nondiscriminatory education opportunities for all regardless of race, creed, national origin, color or sex, and to eliminate and prohibit segregated or separate schools or school districts on the basis of race, creed or color. He is further obliged by law to report and recom-

mend to the general assembly remedies for observed imperfections in the operation of the public schools.

4. The maintenance and operation of separate school corporations within Marion County, Indiana and in townships of adjacent counties contiguous to Marion County, Indiana and within the Indianapolis Metropolitan Area has resulted in the maintenance and perpetuation of racial discrimination against intervening plaintiffs and other Black pupils similarly situated in the public schools governed by the defendant school corporations, in violation of the intervening plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States and Article VIII Section I of the Constitution of Indiana.

5. The State Superintendent of Public Instruction has failed and neglected to perform his Constitutional and statutory duties and has thereby contributed to and participated in the maintenance and perpetuation of racial discrimination in the defendant school corporations, in violation of intervening plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States and Article VIII Section I of the Constitution of Indiana.

WHEREFORE, intervening plaintiffs pray that the defendant Superintendent of Public Instruction be directed and required to take all administrative and executive action necessary to eliminate every facet of race discrimination in the Public Schools in Marion County, Indiana and to recommend to the general assembly of the State of Indiana the creation of an Indianapolis Metropolitan School District, embracing all of Marion County and the contiguous townships of adjacent counties and that in the absence of appropriate action by the general assembly to purge the State of Indiana and its agencies and officers of their role in contributing to *de jure* segregation

within the defendant school corporations, that the court create such an Indianapolis Metropolitan School District, and grant each other relief as may be appropriate.

Count III

Intervening Plaintiffs, for their third cause of action, allege:

1. They reallege and incorporate herein by reference the allegations of paragraphs 1 and 3 of Count I herein.

2. They reallege and incorporate herein by reference as if fully set out herein, the allegations of paragraph 3, 8, 10, 11 and 12 of the complaint filed herein by the United States on May 31, 1968.

WHEREFORE, intervening plaintiffs pray that the Court grant such injunctive and declaratory relief as may be appropriate.

/s/ JOHN O. MOSS

JOHN O. MOSS
Attorney for Intervening
Plaintiffs
156 E. Market #902
Indianapolis, Indiana 46204
635-1945

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed to the Attorneys of Record for the defendants this ——— day of ————————————, 1971.

/s/ JOHN O. MOSS

JOHN O. MOSS

A-149

United States District Court

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	
DONNY BRURELL BUCKLEY, et al., *Intervening Plaintiffs,*	
v.	No. IP 68-C-225
BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	

Plaintiff-intervenors allege:

1. This Court has jurisdiction of action pursuant to 42 U.S.C. 1983 and 1988, 28 U.S.C. 1343(3), 2201 and 2202, and the Fourteenth Amendment to the Constitution of the United States.

2. Plaintiff-intervenors are Negro children and their parent who reside in the areas served by public schools maintained and operated by one or more of the defendant school authorities and who are eligible to attend such public schools. Plaintiff-intervenors sue on behalf of themselves and all other school-age children, and their parents, similarly situated in the areas served by the defendant school authorities. Plaintiff intervenors satisfy all requirements of Rule 23, F.R. Civ. P., and in particular the class represented is so numerous that joinder of all members is impracticable, these are questions of law and fact common to the class, the claims of plaintiff-intervenors are

typical of the claims of the class, and plaintiff-intervenors will fairly and adequately protect the interests of the class.

3. Defendant Edgar D. Whitcomb is the Governor and chief executive officer of the State of Indiana, and as such he is charged with the faithful execution of the Constitution and laws of Indiana in a manner consistent with the Constitution and laws of the United States.

4. Defendant Theodore Sendak is the Attorney General and chief legal officer of the State of Indiana and as such he is responsible for the enforcement of the Constitution and laws of Indiana in a manner consisten with the Constitution and laws of the United States.

5. Defendant John J. Loughlin is the Superintendent of Public Instruction of the State of Indiana and as such is charged by law with the administration of the system of public instruction and general superintendence of the business relating to the common schools in a manner consistent with the requirements of the Constitution and laws of the United States, and he is obligated to implement the public policy of the State of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunities for all regardless of race, creed, national origin, color or sex, and to eliminate and prohibit segregated or separate schools or school districts on the basis of race, creed, or color. He is further obliged by law to report and recommend to the general assembly remedies for observed imperfections in the operation of the public schools.

6. Defendants Board of School Commissioners of the City of Indianapolis; Metropolitan School District of Washington Township; Metropolitan School District of Lawrence Township; Metropolitan School District of War-

ren Township; Franklin Township Community School Corp.; Metropolitan School District of Perry Township; Metropolitan School District of Decatur Township; Metropolitan School District of Wayne Township; Metropolitan School District of Pike Township; School Town of Speedway; and Beech Grove City Schools; Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corp., Hancock County, Indiana; Greenfield Central Community School Corp., Hancock County, Indiana; Greenwood Community School Corp., Johnson County, Indiana; Mooresville Consolidated School Corp., Morgan County, Indiana; Plainfield Community School Corp., Hendricks County, Indiana; Avon Community School Corp., Hendricks County, Indiana; Eagle-Union Community School Corp., Boone County, Indiana; and Brownsburg Community School Corp., Hendricks County, Indiana, are all common school corporations organized and existing under the laws of the State of Indiana with geographical boundaries within Marion County, Indiana, or within the Indianapolis Metropolitan Statistical Area as defined by the United States Census, and acting as agents of the State of Indiana to fulfill the duty imposed upon it by the State Constitution to provide for a general and uniform system of common schools; and they are obliged to discharge that responsibility in a manner consistent with the requirements of the Constitution and laws of the United States; and they are proper parties defendant to this action.

7. The defendant Indiana State Board of Education is a public corporate body in general charge of the schools of the State of Indiana.

8. All defendants reside or perform their official duties, in which capacity they are sued, in the southern judicial district of Indiana.

9. By their present method of maintaining and operating separate school corporations, the defendants have effected racial segregation and discrimination in the operation of public schools and school systems serving Marion County Indiana, and the Indianapolis metropolitan area, in violation of the rights secured to plaintiff-intervenors by the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section I of the Constitution of Indiana.

10. Section 314 of Chapter 173 of 1969, Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), which chapter is known as the "Consolidated First Class Cities and Counties Act" is unconstitutional and void insofar as its purports to exempt from the scope and effect of said act the consolidation of all school corporations within Marion County, Indiana. The purpose and effect of such exemption as further implemented and enabled by the provisions of Chapter 186 of the Acts of 1961, Burns Ind. Stat. Ann. § 28-2338 to 28-2347 (1968 Cum. Supp.) and Chapter 52 of the Acts of 1969, Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.) have been and are to perpetuate segregation on the basis of race and to inhibit desegregation in the public schools and school systems of Marion County.

11. The State of Indiana, acting through the defendants and their predecessors and otherwise, has engaged in acts, practices, customs, and usages which have had the natural, probable, foreseeable, and actual effect of incorporating into schools and school systems serving Marion County and the Indianapolis metropolitan area public and private residential racial segregation and discrimination, in violation of the right of plaintiff-intervenors not to be segregated on the basis of race in public schools and school districts.

12. The State of Indiana, acting through the defendants and their predecessors and otherwise, has allocated and permitted to be allocated educational resources in a manner that has had the natural, probable, foreseeable and actual effects, in the Indianapolis metropolitan area, of: (a) discriminating on the basis of race against children attending the public schools within the School City of Indianapolis; and (b) establishing and maintaining the pattern of racially separate schools and school systems as described in paragraph eight (8) above, in violation of the rights secured to plaintiff-intervenors by the Fourteenth Amendment to the United States Constitution and the Constitution and laws of Indiana.

13. The defendants' present method of operating separate school corporations in Marion County and the Indianapolis metropolitan area, with the discriminatory effects described herein, is not required for the fulfillment of the State's *bona fide* educational objectives.

14. The defendants have implemented other forms of school organization in the State of Indiana and in and about the Indianapolis metropolitan area which have circumvented, crossed, and otherwise disregarded political boundaries for the purpose of achieving educational objectives within and among single school communities in the Indianapolis metropolitan area and elsewhere in Indiana.

15. Other educationally sound, feasible and practicable alternative methods of school and school district organization are reasonably available to the defendants' and their implementation would fulfill the defendants' educational objectives within the requirement that they operate now and hereafter only unitary schools and school systems.

16. Plaintiff-intervenors reallege and incorporate here by reference, as if fully set out, the allegations of para-

graphs 3, 8, 9, 10, 11, and 12 of the complaint of plaintiff United States filed on May 31, 1968.

WHEREFORE, plaintiff-intervenors pray that this Court adjudge, decree, and declare that Chapter 186 of the Indiana Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969 are unconstitutional, null, and void, insofar as they effect racially separate public schools and school systems in Marion County and the Indianapolis metropolitan area.

Plaintiff-intervenors further pray that the defendants, their agents, servants, employees, and all persons in active concert or participation with them be preliminarily and permanently enjoined and restrained to take forthwith all steps reasonably necessary to secure to plaintiff-intervenors their right to attend racially nonsegregated and nondiscriminatory schools and school systems, including if necessary:

(a) the consolidation or merger of the defendant school systems in all aspects of school operation and administration, including but not limited to, the appointment of an acting superintendent to manage the consolidated systems, the merger of the existing Boards of Education pending the selection by election, appointment, or otherwise of a new Board of Education representative of the consolidated system, and further requiring that board shall be the successor Board of Education for the defendant school systems assuming all rights, powers, responsibilities, duties and obligations presently held, in whole or in part, by the defendant school boards; and further requiring that each defendant shall, by withholding of funds or accreditation and by the exercise of any and all powers available to each, insure the full cooperation of the other defendants and the prompt accomplishment of said consolidation or merger; or

(b) the adoption and implementation by all defendants of such agreements, contracts, or other arrangements with respect to the operation of educational systems in the Indianapolis metropolitan area as will secure to plaintiff-intervenors equal educational opportunitities in segregated and nondiscriminatory schools and school systems;

Plaintiffs further pray that this Court require the defendants to prepare and submit for approval of the Court a plan for the operation of all the public schools within the defendant school systems in conformity with the requirements of the Fourteenth Amendment, including but not limited to, the nondiscriminatory allocation of resources, the establishment of schools, pupil populations, staffs, faculties, transportation routes and extracurricular activities which are not racially indentifiable, and to be effective at the earliest possible date.

Plaintiff-intervenors further pray that this Court allow them their costs herein and reasonable attorneys' fees.

Plaintiffs further pray for each other, further or additional relief as to the Court may appear just and necessary.

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UNITED STATES OF AMERICA, *Plaintiff,* v. THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	United States District Court, S. D. Indiana, Indianapolis Division. No. IP 68-C-225 Aug. 18, 1971.

MEMORANDUM OF DECISION

DILLIN, District Judge.

This action, filed May 31, 1968, was tried by the Court on July 12-21, 1971. The Court has considered the voluminous testimony, the more than 200 exhibits, the post-trial briefs, has taken judicial notice of certain historical facts believed to be matters of common knowledge, and now files its findings of fact and conclusions of law in the form of this memorandum. Rule 52(a), Federal Rules of Civil Procedure.

I. GENERAL

This is a school desegregation action brought by the United States pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b). The defendants are The Board of School Commissioners of Indianapolis, Indiana (hereinafter "School Board" or "Board"), the members of the Board, and its appointed Superintendent of Schools.

The defendant School Board is a common school corporation organized and existing under the laws of the State of Indiana. It is situated within Marion County, Indiana, and governs, manages, and controls all of the public elementary and high schools within a geographical area known as the School City of Indianapolis (hereinafter

"School City"), all as required by Indiana law. The shape of the School City resembles that of a trussed fowl, with its head to the north, its bound feet to the south, and its flapping wings extending east and west. The east-west wingspread, at its greatest, is about 16 miles. The north-south dimension of the School City is about 13 miles.

During the 1970-71 school year, the School Board operated 110 elementary schools. The usual (but not invariable) grade structure of the elementary schools was a kindergarten-through-eighth-grade structure. Among these 110 schools were 6 junior high schools. During the 1970-71 school year, two of the elementary schools were devoted entirely to the education of mentally retarded children, and one of the elementary schools was devoted entirely to the education of physically handicapped children and children having both physical and mental handicaps.

During the 1970-71 school year, the School Board operated 11 high schools. With the exceptions hereinafter noted, each of these high schools housed students in grades 9 through 12 who had attended one of the "feeder schools" regularly assigned to the particular high school. The exceptions to these general statements are that Crispus Attucks High School (hereinafter "Crispus Attucks") housed students in grades 10 through 12 only, its 9th grade class having been divided between the newly acquired Cold Spring Campus and Northwest High School (hereinafter "Northwest") and that Shortridge High School (hereinafter "Shortridge") housed a 9th grade made up of students from assigned "feeder schools" and 3 classes of students who were attending Shortridge under "the Shortridge Plan." Also, a comparatively small number of students were transferred to high schools other than those to which originally assigned, pursuant to the transfer policies of the Board.

The total enrollment in the elementary schools at the close of the 1970-71 school year was 77,658 students (excluding special education students). Negro students constituted 37.4% of that total. The total enrollment in the high schools at that time was 22,487 students. Negro students constituted 33.6% of that total. There were approximately 4,379 faculty members, of whom 976 (22%) were Negro.

Of the seven persons currently serving as members of the School Board three are Negroes (Mrs. Cary D. Jacobs, The Reverend Landrum E. Shields, and Mr. Robert D. DeFrantz). Mr. Shields served as President of the School Board from the date of the Board's first meeting in July, 1970, until July 13, 1971, on which latter date Mr. DeFrantz was elected to the Presidency, in which position he presently serves. The Board does not appear to be polarized along racial lines, and the personnel of central administration, operating under the direction of the Superintendent, likewise refects a reasonable racial balance.

On February 6, 1970, an Indiana not-for-profit corporation, Citizens of Indianapolis for Quality Schools, Inc., attempted to intervene herein as a party defendant, asserting that its membership consisted exclusively of parents of students in the Indianapolis public schools who possessed a legally cognizable interest in the proceeding on such account. The motion to intervene was accompanied by petitions executed by some 5,000, more or less, parents who requested such intervention. The petition to intervene was denied by the Court, for the reason that the corporation did not appear to have an interest sufficient to permit intervention as of right pursuant to Rule 24 (a) (2), F.R.C.P. *Hobson v. Hansen*, D.C. Dist., 1968, 269 F.Supp. 401; *Blocker v. Board of Education of Manhasset, New York*, E.D.N.Y., 1964, 229 F.Supp. 714. Permissive inter-

vention was also denied. *However, Mr. Harold E. Hutson,* attorney for the petitioner, was permitted to appear as amicus curiae, and in such capacity he attended the trial, was furnished with copies of all exhibits, and participated in the argument and post-trial briefing.

II. THE ISSUES

There are but two ultimate factual issues in this case, and two critical dates. The two dates are May 17, 1954, the date of the decision of the Supreme Court of the United States in *Brown v. Board of Education of Topeka ("Brown I")*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180, and May 31, 1968, the date on which this suit was filed.

Brown I, of course, held that in the field of public education the doctrine of "separate but equal" has no place, and that segregation of children in public schools by operation of law solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprives the children of the minority group of equal educational opportunities and hence of the equal protection of the laws guaranteed by the Fourteenth Amendment. Approximately one year later, in the same case (*"Brown II"*), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the Court ordered the District Courts involved in *Brown* and its companion cases "to take such proceedings and enter such orders and decrees • • • as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." It thereupon became the duty of all of the States, operating through their various agents, i.e., boards of school commissioners and the like, such as the defendant Board, to desegregate such school corporations as were practicing *de jure* segregation of their pupils as of May 17, 1954.

The two ultimate issues herein may therefore be stated as follows:

1. Did the School Board operate a dual school system, or, put another way, did it have a deliberate policy of segregating minority (Negro) students from majority (white) students in its schools on May 17, 1954?

2. If the answer to the first question is in the affirmative, had the Board changed its policy so as to eliminate such *de jure* segregation on or before May 31, 1968?

The plaintiff United States of America has the burden of proving the affirmative of the first issue and, if proved, the negative of the second. The defendants deny *de jure* segregation on either of the critical dates, and further urge that a third critical date must be considered: the date of the trial. Their argument in the latter connection is that no matter what may have gone before, if the Board is operating a unitary system as of the date of trial there is no justification for judicial intervention or for the granting of relief in equity.

As will be set out in more detail hereafter, the Court finds for the plaintiff on each of the ultimate issues of fact. The argument that conditions as of the date of trial should control the action is rejected, first for the legal reason that complaints, and the proof of same, must relate to conditions as of the date of filing; plaintiff is always entitled to judgment, if only for costs, if it proves the essential elements of its complaint as of such time. It is true that the initiation of a legal action may, and frequently does motivate the defendant to grant all or part of the relief sought prior to trial, thus rendering the action moot in whole or in part. In a simple action such as a suit on account, where the only relief sought is money, it is obvious

that payment in full by the defendant before trial would effectively render the action moot for all time, save for payment of costs. Where the relief sought is equitable, however, particularly in a complex case such as this where the equitable relief sought is affirmative rather than being limited to a negative injunction, voluntary compliance in advance of trial would not deprive the Court of jurisdiction to insure the continuation of such compliance by appropriate orders. In any event, however, the Court finds that the Board had not, as of the date of trial, effectively desegregated its school system to the extent required by *Brown II*.

III. HISTORY

Perhaps one of the greatest public misunderstandings as to the operation of the public schools of the State of Indiana is that the responsibility for the conduct of such schools is purely local. It is not difficult to understand the basis for such misconception as the schools are, as a practical matter, operated by local boards, locally elected, subject only to the general oversight of the Indiana State Board of Education and the State Superintendent of Public Instruction. They are paid for to a large extent by funds derived from local property taxes. That part of the property tax allocated to the funding of the public school system constitutes by far the largest portion of the taxes levied in every taxing unit of the State. (The 1971-72 budget adopted by defendant Board is in excess of $82,000,000.)

Nevertheless, the fact remains that the ultimate responsibility for the public schools, and the duty to provide a "general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all"

is placed squarely upon the State[1]. It has therefore been held in numerous cases that the State school system is a State institution, and that school corporations organized under, or by virtue of, the laws of the State are but the agents of the State.[2] Therefore, in reviewing briefly the events leading up and contributing to the educational plight of the Negro in Indianapolis in 1954, 1968, and at present, it is necessary and proper to consider historic policies of the State and various of its agencies, as well as the acts and omissions of the Board itself.

A. Territorial Attitudes

The first twenty Africans who lived within the boundaries of what later became the original thirteen States landed at Jamestown, Virginia, in 1619, thus predating by a year the more highly publicized landfall at Plymouth Rock. In early Virginia, as in other colonies, the first Negro settlers were free, and accumulated land, voted, testified in court and mingled with whites on a basis of equality.[3] Unfortunately for them and their progeny, in the 1660's Virginia, Maryland and other states enacted the first of a series of laws which later led to the establishment of slavery on the basis of race, with results which are well known.

Virginia and Virginians played major roles in the early history of Indiana. At one time Kentucky was merely a

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[1] Constitution of the State of Indiana, 1851, Art. 8, § 1.

[2] Ratcliff v. Dick Johnson School Twp., 1933, 204 Ind. 525, 185 N. E. 143, Greathouse v. Board of School Com'rs, 1926, 198 Ind. 95, 151 N. E. 411; Ehle v. State ex rel. Wissler, 1922, 191 Ind. 502, 133 N. E. 748; School Town of Windfall City v. Somerville, 1914, 181 Ind. 463, 104 N. E. 859; Jordan v. Logansport, 1912, 178 Ind. 629, 99 N. E. 1060; State ex rel. Warren v. Ogan, 1902, 159 Ind. 119, 63 N. E. 227; Freel v. School City of Crawfordsville, 1895, 142 Ind. 27, 41 N. E. 312.

[3] L. Bennett, Jr., Before the Mayflower, 29-36 (3rd Ed. 1966).

county of that Commonwealth, which also claimed all of the lands north and west of the Ohio River, east of the Mississippi and south of Canada. Many of the earliest white settlers of Indiana were Virginians and they, together with persons of similar background from Kentucky and the Carolinas, all States where slavery was practiced, made up the majority. When Virginia ceded the Northwest Territory in 1784, it was pursuant to a reservation of land to be donated to General George Rogers Clark and members of his Virginia regiment for services rendered in the Revolutionary War,[4] and such grants were made—many for tracts in Indiana. The first territorial governor of the Indiana Territory, following its establishment in 1800, was William Henry Harrison, another Virginian. The son of an influential Virginia planter, he could scarcely have avoided the culture of the southern country gentleman.[5]

The racial attitudes of Harrison and the early settlers of the Territory (which also included, among other land, all of present day Illinois) quickly became apparent. Although Article 6 of the Ordinance of 1787, providing for the government of the Northwest Territory, prohibited slavery and involuntary servitude in the Territory,[6] which provision was carried forward to the Indiana Territory,[7] they set about immediately to secure the repeal or suspension of Article 6.[8] When the Congress failed to act favorably upon their repeated requests, Harrison and the territorial judges, acting in their legislative capacity, went so

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[4] Act of Virginia, December 20, 1783. 1 Burns Ind. Stat. Ann. 369 (1955 Repl.).

[5] J. Barnhart & D. Riker, Indiana to 1816, at 315 (1971) (hereinafter "Barnhart & Riker").

[6] 1 Burns Ind. Stat. Ann. 376 (1955 Repl.).

[7] Act of May 7, 1800. 1 Burns Ind. Stat. Ann. 380 (1955 Repl.).

[8] See generally Barnhart & Riker, 334-335, 347-354.

far as to adopt a law in 1803 providing that Negroes and mulattoes brought into the territory must perform the service due their masters and that contracts between master and servant were assignable.[9] Another such law provided that slaves purchased outside Indiana and brought within the territory had the Hobson's choice of agreeing to being bound to service or of being taken out of the territory (presumably for resale).[10] Some Negroes were bound to service under indentures for as long as ninety-nine years.[11]

B. Statehood: General Policies

Statehood brought no immediate change. Although slavery was once again prohibited, it is noteworthy that of 1,326 Negroes counted in the 1820 census, 503 were candidly listed as slaves.[12] Discrimination became the official policy of the State, as evidenced by the successive Constitutions of 1816 and 1851, and by the laws enacted by the General Assembly. For example, both Constitutions limited the right to vote[13] and to serve in the militia[14] to white males; these restrictions were not removed until the adoption of constitutional amendments in 1881 and 1936, respectively. A statute of 1818, similar to one enacted during the territorial period, declared that no person with a fourth or more of Negro blood could give testimony in court in a case involving a white party.[15]

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[9] Philbrick (ed.), Laws of Indiana Territory, 1801-1809, at 42-46.

[10] *Ibid.*, 136-139.

[11] E. Thornbrough, Since Emancipation, 1 (1963) (hereinafter "Thornbrough").

[12] W. Heiss (ed.), 1820 Federal Census For Indiana (1966).

[13] Constitution of 1816, Art. 6 § 1; Constitution of 1851, Art. 2 § 2.

[14] Constitution of 1816, Art. 7 § 1; Constitution of 1851, Art. 12 § 1.

[15] Acts 1818, Ch. 3, § 52,p. 39.

Intermarriage between whites and persons of Negro blood was likewise prohibited in 1818.[16] Subsequently, the Act was clarified so as to extend the prohibition to a person having one-eighth part or more of Negro blood, and made violation a felony punishable by a fine and imprisonment for from one to ten years. Such statute, as it existed in 1971, was unanimously held constitutional by the Supreme Court of Indiana,[17] notwithstanding the adoption in 1868 of the Fourteenth Amendment to the Federal Constitution. The last reenactment of such law[18] was not repealed until 1965. Similarly, an 1852 act[19] declared such marriages to be void, thus creating obvious limitations on the right of inheritance and other legal benefits upon the death of a spouse.[20] This law, too, was not repealed until 1965.

The most striking evidence of the hostility of the white majority was shown in efforts to exclude Negroes from the state and to persuade those already in the state to leave. A law of 1831, which was seldom enforced, required Negroes coming into the state to post bond as a guarantee against becoming a public charge and as a pledge of good behavior. More drastic was Article 12 of the constitution of 1851 which flatly prohibited Negroes and mulattoes from coming into the state and which provided for pen-

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[16] Acts 1818, Ch. 5, § 59, p. 94.

[17] State v. Gibson, 1871, 36 Ind. 389.

[18] Acts 1905, Ch. 169, §§ 638, 639, p. 584.

[19] 1 R. S. 1852, Ch. 67, § 2, p. 361.

[20] As recently as 1940 the 1852 Act was raised in defense of a claim for death benefits under the Indiana Workmen's Compensation Act, the contention being that the widow, a Negro, could not have been married to the decedent because he was white. The Appellate Court held the defense good as a matter of law, if proved, but affirmed the Industrial Board's award to the widow on the interesting ground that the decedent, a Mexican, had not been proved to be "white." Inland Steel Co. v. Barcena, 1942, 110 Ind. App. 551, 39 N. E.2d 800.

alties for persons who encouraged them to come. Closely linked to the exclusion movement was the colonization movement, which sought to preserve the soil of Indiana for white men by sending Negro residents to Africa. A state colonization society, affiliated with the American Colonization Society, had been organized in 1829 but had never accomplished much. Article 13 of the Constitution of 1851 contained a section encouraging colonization. For several years the state legislature appropriated money for a colonization fund and paid the salary of a State Agent who was supposed to encourage Negroes to emigrate to Africa.[21] Article 13 was held to be null and void in 1866.[22]

In 1885, the General Assembly passed a civil rights law providing that all persons within the jurisdiction of the State were entitled to full and equal enjoyment of the accommodations of "inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement;" such law also prohibited discrimination because of race or color in the section of jurors.[23] It is common knowledge that until the past decade, many parts of this law were more honored in their breach than in their observance, particularly as to the first four categories, often with an assist from the judicial arm of the State.[24] Negroes were rarely admitted, save on a segregated basis,

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[21] Thornbrough, p. 2.

[22] Smith v. Moody, et al., 1866, 26 Id. 299.

[23] Acts 1885, Ch. 47, p. 76.

[24] See, for example, the ingenuous decision in Chochos, et al., v. Burden, et al., 1920, 74 Ind. App. 242, 128 N.E. 696, wherein two Negro women refused service in a Greek candy kitchen selling ice cream, soda water, etc., for consumption on the premises had their judgments for nominal damages reversed on the ground that such an establishment did not constitute an "eating-house."

to theatres,[25] public parks, and the like, including State parks operated by the Indiana Department of Conservation, until after World War II. They were confined to segregated wards in public hospitals supported by tax funds, and as we shall see, largely attended segregated schools.[26]

C. Housing Policy

Before turning attention to the schools, however, another area of segregation needs mention, and that is in the matter of housing. Just as was the case in Virginia, so in Indianapolis persons of African descent were present from the beginning. It has been recorded that on the very mission which resulted in the location of the new state capitol on the banks of Fall Creek, Governor Jennings was accompanied by a Negro boy known to history only as Bill.[27] More to the point, Ephriam Ensaw, a freed man who worked for wages, settled in the new town, along with various white settlers, even before the surveyors had finished staking the lots.[28] However, by the time the first German and Irish immigrants had been imported in 1836 to work on the Central Canal, most Negroes were to be found in "Colored Town," on the outskirts of the mile square,[29] and were later concentrated in the area around Indiana Avenue.

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[25] In 1932, when an Indianapolis movie house opened its doors free to Butler University students in celebration of a football victory, Negro students were barred. Thornbrough, p. 88. (Presumably, however, the celebrants all marched to the tune of *Butler Will Shine Tonight*, the school cheer song written, when a student, by Noble Sissle, an Indianapolis Negro. Sissle went on to national fame as a musician, composer, orchestra leader, and writer/producer of successful Broadway musicals.)

[26] For an extended discussion of these and similar examples of State imposed or tolerated segregation, see Thornbrough, pp. 86-93.

[27] Leary, Indianapolis The Story of a City (1970), p. 8 (hereinafter "Leary").

[28] *Ibid.*, p. 13.

[29] *Ibid.*, p. 50.

Segregation in the housing of Negroes in Indianapolis has persisted at least until the date of the filing of this action.[30] As the evidence in this case discloses without conflict, Negroes were discouraged from purchasing homes in predominantly "white" neighborhoods by various methods: white realtors refused to show homes to Negroes (and no Negro real estate broker was permitted to become a member of the Indianapolis Real Estate Association until 1962), a two-price system was used: a realistic market price to whites and a ridiculously inflated price to Negroes, lending institutions refused to finance homes sought to be purchased by Negroes in "white" areas. Those pioneering Negroes who nevertheless overcame all obstacles and succeeded in purchasing a home were then harassed by such devices as threatening and obscene telephone calls, stones hurled through windows, neighborhood ostracism, etc.[31] Certain streets and other landmarks, such as Fall Creek, White River, certain railroad tracks, etc., were regulated at different times as barriers to be hurdled by Negroes at their peril.

In addition to pressures of the foregoing type, applied by individual whites, residential segregation was also enforced by law, in many instances. Perhaps the best known method was by means of the racial covenant which, when inserted into a deed or plat of a real estate subdivision, limited ownership of the lot to persons of the white race. As may be noted from a cursory observation of plats recorded in the plat books kept in the office of the recorder

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[30] The Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, 42 U. S. C. §§ 3601 et seq. was not fully effective until December 31, 1969, and its effects have barely begun to be felt.

[31] One who received such treatment was Mr. Grant Hawkins, a graduate of Indiana University, successful businessman, and first Negro member of the School Board. For a more detailed discussion, see Thornbrough, pp. 22-29.

of Marion County, many of the better known subdivisions, such as Williams Creek Estates, Broadmoor Estates, Meridian Hills, Highwoods Addition, Forest Hills, Wellington Estates, Fall Creek Highlands, Greenslopes, Wynedale, Ellenberger Plaza, and Meridian-Kessler Terrace, contained such covenants, which were routinely enforced until held unconstitutional in 1948.[32]

As shown by the evidence herein, the City of Indianapolis took official action to enforce segregation in 1926 when the City Council, with only one dissenting vote,[33] adopted General Ordinance No. 15, making it unlawful for any Negro "to establish a home-residence on any property located in a white community or portion of the municipality inhabited principally by white people * * *," or for a white person to commit the same act in a Negro community. The ordinance imposed a fine and imprisonment for violation, and further provided that each seven days maintenance of such a residence would be deemed a separate offense.[34] Passage of the ordinance was noted by The Indianapolis News, then and now one of Indiana's leading newspapers, which stated that "Sincere convictions are represented in the ordinance * * *" and "Patience and forbearance are called for."[35] When the Marion Circuit Court held the ordinance unconstitution a short time later. The Indianapolis News had a plan of action. "One thing should be done as soon as possible," it editorialized, "and that is to pave the streets in colored

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[32] The plats of Kessler Park and Crippin's River Park Addition were recorded with racial convenants in 1949, after they had already been held unconstitutional by the Supreme Court in Hurd v. Hodge, 1948, 334 U. S. 24, 68 S.Ct. 847, 92 L.Ed. 1187.

[33] The Honorable Edward B. Raub voted in the negative.

[34] The Mayor and most members of the City Council of this period (not including Raub) had been elected with the support of the Ku Klux Klan. For a short summary of the Klan era see Leary, Ch. 23.

[35] The Indianapolis News, editorial, March 16, 1926.

neighborhoods, and make them so attractive that there will be no desire to get out of them * * *. The surroundings should be made as good as those in white sections, so that there may be no reason for leaving them."[36] As recently as July 4, 1963, the major Indianapolis newspapers, in their real estate want ad columns, used the designation "for colored," or "col." in describing residential property in certain sections of the city.

It is common knowledge that in many small towns and a few larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials.[37] Thus today it is noticeable that almost no Negroes are to be found in communities adjoining the School City of Indianapolis. Marion County has three municipalities other than Indianapolis, all contiguous to the School City. Beech Grove, an industrial community of 13,432, has a Negro population of 19. Speedway City, a similar type community, has 68 Negroes out of a total population of 14,951, while Lawrence has 216 Negroes out of a total population of 18,997. Of Marion County's 792,299 residents, 134,474 or 17% are Negro. Of these, approximately 122,086, or 98.5% are confined to the central area served by the defendant School Board.[38]

The Bureau of the Census recognizes approximately 250 standard metropolitan statistical areas in the 1970 census.[39] Such an area is a county or group of contiguous counties which contains at least one city of 50,000 or more inhabitants and which according to certain criteria, are socially

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[36] *Ibid.*, November 24, 1926.

[37] Thornbrough, p. 21.

[38] All statistics are based upon the 1970 census.

[39] Bureau of the Budget, Standard Metropolitan Statistical Areas (1967, as supplemented).

and economically integrated with the central city. The Indianapolis Metropolitan Statistical Area has 1,109,882 inhabitants and includes, in addition to Marion County, the contiguous counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Morgan, and Shelby. The 1970 census figures reflect a total of 2,849 Negroes out of a total population of 317,583 residing in these seven suburban counties, a percentage of 0.897.

D. School Policies to 1949

In early Indiana, as has been seen, the Negro lacked many of the rights which are the ordinary attributes of citizenship. The plain fact is that, although entitled to certain rights under Indiana law, such as the right to own property and the right to personal liberty, Negroes were not considered to be citizens of the State until the adoption of the Fourteenth Amendment to the Constitution of the United State.[40] For this reason, many of the rights conferred upon citizens by the successive Indiana Constitutions were construed as not applying to Negroes.

Thus in an early case it was held that Negro children could not attend school with white children over the protest of a white parent, even if they paid their own tuition.[41] A statute in force in 1861 barred Negroes, mulattoes and the children of mulattoes from admission to the common schools.[42] After the adoption of the Fourteenth Amendment, the General Assembly in 1869 enacted a law providing, for the first time, for the education of Negro children, but providing also for them to be organized into separate

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[40] Corey, et al. v. Carter, 1874, 48 Ind. 327.

[41] Lewis v. Henley, et al., 1850, 2 Ind. 332.

[42] Draper, Trustee, et al. v Cambridge, 1863, 20 Ind. 268.

schools. The statute provided that if there were not a sufficient number of such children within attending distance to form a school in one district, several districts could be consolidated; and if there were not enough to be consolidated within a reasonable distance, "the trustee * * * shall provide such other means of education for said children as shall use their proportion, according to members, of school revenue to the best advantage."[43]

The case of Cory et al. v. Carter[44] was commenced by Carter, a Negro parent of school age children, against the school officials of Lawrence Township, Marion County, to compel them to accept his children as pupils in the "white" district school, such officials having failed to provide any school in that or any adjoining district near enough for his children to attend, whereby they were denied the right to attend any school at all. He secured an order of mandate from the Marion Superior Court, but the Supreme Court reversed, holding that under the 1869 Act Negro children were not entitled to admission in common schools provided for the education of white students. This holding was reaffirmed in subsequent cases.[45]

In about 1868 Indianapolis erected a new school house and, anticipating the 1869 legislation, assigned the old building on Market Street for the education of Negro children.[46] A separate elementary school was opened there in the fall of 1869. Thus at the very inception of public

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[43] Acts 1869, Ch. 16, § 3, p. 41.

[44] Note 40, *supra.*

[45] Greathouse v. Board of School Com'rs, 1926, 198 Ind. 95, 151 N. E. 411; State ex rel. Mitchell v. Gray, et al., School Trustees, 1883, 93 Ind. 303; State ex rel. Oliver, et al. v. Grubb, Trustee, 1882, 85 Ind. 213.

[46] Leary, p. 118.

education for the Indianapolis Negro child, he was segregated by virtue of State law. As will be demonstrated later, *de jure* segregation in the elementary schools continued virtually without change until this action was filed, one hundred years later. The situation with respect to high schools has taken a more erratic course.

Indianapolis' first high school was Shortridge, followed by Emmerich Manual Training and Arsenal Technical. For more than fifty years no separate high school for Negro students was established, and after 1877 school children of both races were permitted to select the high school of their choice, attending on an integrated basis.[47] However, with impetus provided by a petition from the Indianapolis Chamber of Commerce, the School Board on December 22, 1922, adopted a resolution authorizing the construction of a "Colored High School." When such school, Crispus Attucks, was opened in September, 1927, all Negro high school students were forthwith compelled to attend it, regardless of their place of residence in the city. In 1935, Ch. 16 of the Acts of 1869 was further amended to require the Board to provide transportation for Negro students required to travel more than a certain distance by reason of its segregation policies.[48] Thus was instituted the policy of tax-paid transportation of school children (bussing).

Another Act of the 1935 General Assembly is instructive. A law enacted in 1907 had directed township trustees to abandon all schools under their charge at which the average daily attendance had been twelve or fewer pupils. The 1935 act[49] added the following proviso: "Provided, further,

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[47] Acts 1877, Ch. 81, § 1, p. 124, had amended Ch. 16 of the Acts of 1869 to require admission of Negro students to white schools, if no separate school of comparable grade was provided for Negroes.

[48] Acts 1935, Ch. 296, § 1, p. 1457.

[49] Acts 1935, Ch. 77, § 1, p. 231.

that nothing in this act, or in the act to which it is amendatory, shall authorize the discontinuance of any school exclusively for colored pupils where such school is the only school for colored pupils in such school corporation, and any such school heretofore discontinued by the operation of such act shall be re-established." (In sum, trustees were ordered by the State to furnish a separate school building and teacher for the instruction of, for example, one Negro child attending primary school, rather than permit that child to attend a white school).

In 1947, two bills were introduced in the General Assembly, each of which had as its purpose the elimination of segregation based on race, color, creed, etc., in the public school system. In due time, a public hearing was held on one of the bills by the House Committee on Education, at which time the then Superintendent of Schools of defendant Board, pursuant to its authorization, appeared and spoke in opposition. Neither bill passed. However, in 1949 an Act was passed which required desegregation, on a phased basis.[50] Thus ended, at least for a time (see Part VII), the official State policy of segregation.

IV. BOARD POLICIES, 1949-1954

As has been shown, the official policy of the State of Indiana and of its agent, the defendant School Board, was one of *de jure* separation of its Negro and white students prior to 1949. During the 1948-49 school year only 614 out of a total of 11,304 Negro students (5.4%) attended regular elementary schools of racially mixed population. The other 10,690 pupils attended sixteen all-Negro elementary schools and all-Negro Crispus Attucks High School. The

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[50] Acts 1949, Ch. 186, p. 603; Burns Ind. Stat. Ann. §§ 28-6106 to 28-6112 (1970), as amended I. C. 1971, 20-4-1-7 to 20-4-1-13.

faculty and staff of each school was completely segregated, and the Superintendent's administrative staff was all white. Generally, Negro schools were built in Negro residential areas and white schools in white areas, and when residential patterns were mixed, Negro and white attendance zones overlapped. Grade structures were altered to achieve segregation in some instances. Negro students in the elementary grades were required to walk, or were transported to all-Negro schools when there were schools, serving only white students, closer to their homes. None of these facts were denied by the defendants.

The 1949 Act which abolished segregation in the public schools, required segregated districts to begin desegregating a grade a year by permitting those students enrolling for the first time in kindergarten, the first elementary grade, and the first junior and senior high school grades to enroll in the school nearest their homes. Accordingly, the Board adopted a policy which, on its face, generally followed the provisions of the statute.[51]

In some instances where desegregation would have resulted if children had been assigned to the closest school, they were assigned to segregated schools farther from their homes. The Board's construction policies during the period 1949-53 minimized the amount of desegregation that occurred. The formerly "colored" elementary schools generally remained all-Negro. Likewise, though specific student assignments were made for all high schools, Crispus Attucks remained all-Negro. With one exception, students

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[51] There were, however, exceptions to this policy. School 19, serving grades 1-6 in 1948-49, did not enroll first grade pupils in 1949-50. Since it was a Negro school in a predominantly white neighborhood, white students in that neighborhood would have been required to enroll in that school under the April, 1949 policy. Negro first graders who would have attended School 19, enrolled at School 64, a nearby all-Negro school, while white students in the School 19 area attended white School 20.

attending the all-Negro elementary schools, some of which were nearer and more accessible to other high schools, were either assigned exclusively or given an option to attend Attucks; partly as a result of administrative suggestion, the option was usually exercised in favor of Attucks. Further, the transfer policies adopted by the Board facilitated the maintenance of segregated high schools.[52]

At the close of the 1952-53 school year the Board drew fixed boundary lines for all elementary schools.[53] These boundary lines were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools. In some instances segregation was promoted by drawing boundary lines which did not follow natural boundaries or were not equidistant between schools.[54] In some instances optional attendance zones between white and Negro schools were adopted in racially integrated neighborhoods. From 1949 to 1953 the high school assignments were maintained in

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[52] One reason for transfers to be given "special consideration" was if a pupil had an older sibling attending the preferred high school. This operated as a grandfather clause permitting white students to escape Attucks, and remained in effect through March, 1970. Furthermore, proximity per se was not a legitimate reason for transfer, unless a student lived more than two miles from the assigned high school; this prevented Negro students who lived within two miles of Attucks from transferring to other high schools which were closer to their residences.

[53] Negro students were, nevertheless, bussed to Negro schools outside their attendance zones from racially mixed areas in at least two cases.

[54] For example, the common boundary between Schools 36 (99.3 Negro in 1953-54) and 60 (11.6% Negro) was within one block of School 36 and some eight to ten blocks from School 60. The boundary between Schools 42 (100% Negro) and 44 (1.2% Negro) required Negro students in one area south of School 42 to cross a canal, a parkway, and two railroad tracks to get to School 42; no such impediment stood between this area and School 44. The School 26 (99.8% Negro) common boundary with School 10 (9.7% Negro) required Negro students in the western one to three blocks of the School 26 zone to cross five railroad tracks to get to School 26; no such impediment existed between this area and School 10.

the same segregatory pattern and the creation of the predominantly white Harry E. Wood High School on the Manual High School campus helped perpetuate the segregation of nearby Crispus Attucks.

At the time of the Supreme Court decision in *Brown I* in May, 1954, the situation was as follows: Of the sixteen "colored schools" as of 1949, two were closed, one was converted to an all-white school,[55] one was subsequently considered part of the Crispus Attucks "Junior Division," and the other twelve were 97.5% or more Negro. Of 2,787 Negro high school students, 1,618 attended Crispus Attucks, and faculty desegregation was minimal. The Board thus began the post-*Brown I* era in May, 1954, in substantially the same position that it ended the official segregation era in 1949. The schools were still segregated by operation of law, by virtue of the acts and omissions of the Board done in defiance of the new requirements of Indiana law.

V. BOARD POLICIES, 1954-1968

From the date of *Brown I* to the date of this action, the Board continued the student and faculty assignment policies of the previous era without change.

Since 1954, the most notable nonracial characteristic of the school system has been growth. The total number of elementary pupils rose from 53,352 in 1954-55 to 82,853 in 1967-68, while the number of schools rose from 87 regular elementary and junior high schools and eight regular high schools in 1954-55 to 113 regular elementary and jun-

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[55] School 19 was converted from an al-Nergo nonneighborhood school to an all-white nonneighborhood school in September, 1953. Almost all the Negro pupils who had attended School 19 were assigned to School 64, as School 64's attendance zone was redrawn to include almost all the Negro students in the area. School 19 served, in 1953-54, two noncontiguous white areas and was located in neither of them.

ior high schools and eleven regular high schools in 1967-68. This growth caused overcrowding problems in many schools at one time or antoher, and the Board had available, and employed, various techniques to deal with this overcrowding.

Among these techniques were attendance zone boundary changes, the construction of additions, the construction of new schools, the provision of transportation or the adjustment of existing transportation, alteration in grade structures, and the location or relocation of special education classes in elementary schools. Often these techniques were combined; e.g., in the construction of an addition and a simultaneous boundary change to relieve overcrowding at two contiguous schools.

The defendant Board has constructed numerous additions to schools since 1954; more often than not the capacity thus created has been used to promote segregation. It has built additions to Negro schools and then zoned Negro students into them from predominantly white schools;[56] it has built additions at white schools for white children attending Negro schools; it has generally failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race.[57] The Board has also constructed simultaneous

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[56] For example, the Board, after hearing complaints about the number of Negroes at School 60, completed the construction of twelve classrooms at School 36 (99.9% Negro) in September, 1959, and zoned some 180 students, predominantly Negro, from School 60 into School 36. Other students, predominantly white, were assigned to School 60 from School 76.

[57] In 1954-55 School 37 (100% Negro) was 104 students over capacity; neighboring School 51 (100% white) was 74 students over capacity. An eight room addition was completed at School 37 in February, 1956. No boundary adjustment was made between 37 and 51, however, and overcrowding at 51 persisted so that by 1958-59, it was 121 students over capacity (and only 1.7% Negro). Finally, in September, 1960, a six classroom addition was completed at School 73 and the boundary between School 51 (5.1% Negro) and School 73 (10.7% Negro) was adjusted so that approximately 75 pupils were sent to School 73 from 51.

additions at contiguous predominantly white and Negro schools,[58] and has installed portable classrooms at schools of one race with no adjustment of boundaries between it and neighboring schools of the opposite race.

The Board has also constructed additions to large, predominately Negro elementary schools when desegregation would have resulted from adding classrooms to nearby, smaller predominantly white schools.[59] These large schools have often had inadequate sites.[60] Of the four largest elementary schools in the system, all are more than 90% Negro, and three have had large additions constructed within the last ten years. For example, an eight classroom addition was completed at School 41 in January, 1962, when it was 99.5% Negro, and had a site of 2.7 acres. For the 1970-71 year this school enrolled 1,404 pupils, 99.7% Negro.

An eight classroom addition was completed at School 64 (99.3% Negro) in September, 1962. Nearby Schools 111 (100% white) and 112 (97.9% white) were purchased after annexation and opened that same month. The children from these latter schools in grades 7 and 8 were transported to School 82 even though School 64 was closer to

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[58] For example, in January, 1957, nine classrooms were added to School 64's neighbor, School 21; in August, 1957, six classrooms were added to School 64. In 1956-57 and 1957-58, School 21 was 99.22% and 98.23% white, and School 64 was 99.08% and 99.77% Negro. As another example, Schools 27, 29 and 45 are within six blocks of one another. From 1954 to 1957 each received additions of four to eight rooms. At the time of construction, School 29 was 85.3% Negro, while 27 and 45 were 96.5% and 95.4% white.

[59] In April, 1961, a survey of elementary principals was taken by the Board, requesting a "professional opinion" as to maximum, ideal, and minimum school sizes. For a K-8 school, the median ideal size designated by the ninety principals returning the questionaire was 600; for a K-6 school, 500.

[60] The State Superintendent of Public Instruction has established minimum acreage requirements of seven acres for the first 200 students and one acre for each additional 100 students.

most of these pupils.[61] This continued through the 1965-66 school year. None of these schools other than 64 was more than 4.5% Negro during such years, while 64 was never less than 99.3% Negro. Further, the faculty at School 64 was 96.4% Negro in 1965-66; the faculties at 82, 111 and 112 were all white that same year.

The failure to assign white children to Attucks had important consequences for the Indianapolis elementary schools. Negro students who formerly had been required to attend Attucks regardless of residence were now permitted, in some cases, to attend high schools closer to their homes. Because there was no off-setting assignment of whites to Attucks, through the arrangement of optional zones and nonneighborhood feeder assignments, the Attucks enrollment dropped substantially during the 1950's while the predominantly white high schools increased in enrollment.

Attucks thus had available space during this period, and could, and did, accommodate elementary students from overcrowded Negro elementary schools. At various times since 1954 the following schools, none of which have ever been less than 96.5% Negro, have been assigned to the Crispus Attucks campus: 63, 17, 23, 24, 40, and 4. Several hundred of these pupils attended school in the Crispus Attucks building during the 1950's. The assignment of students from these elementary schools to Attucks should be contrasted with the assignment of other students, predominantly white, from nearby elementary schools to Arsenal Technical High School during this same period.

During the post-1954 period, the Board perpetuated segregation through the use of optional attendance zones.

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[61] The January, 1967, housing facility study noted that School 82 was "quite crowded during those 4 years" that junior high students were transported to 82 from 111 and 112.

Specifically, in areas of racially mixed residential patterns students were given options between predominantly Negro and predominantly white elementary schools, and where entire elementary districts covered both Negro and white neighborhoods, graduates were given options between predominantly Negro and predominantly white high schools.[62] Students in Negro elementary schools were given options to Crispus Attucks when other, predominantly white high schools were closer and more accesible. White students in optional zones almost always attended white schools.

The Board has perpetuated segregation through the construction of new schools. Specifically, new elementary schools to be attended by students of predominantly one race have been constructed adjacent to schools attended primarily by students of the opposite race,[63] new middle schools have been constructed to enroll the students of one race adjacent to schools attended by students of the opposite race,[64] and new high schools have been located

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[62] School 32 was assigned to Shortridge until September, 1952. At that time, when 32 was 52% Negro, it was given an option to Attucks. By September, 1964, when it was 94% Negro with a 100% Negro faculty, the option was ended and School 32 was assigned solely to Attucks. Similarly, School 44 was assigned to Shortridge until September, 1955, when it was 4.1% Negro. At that time it was given an option to George Washington and Attucks as well as Shortridge. As the percentage of Negroes continued to rise, both the Shortridge and Washington options were dropped and the students were assigned solely to Crispus Attucks.

[63] In March, 1968, a new School 19 building was completed on a site several blocks from the previous School 19. This school was 96.3% white in 1968-69. Its attendance zone is still not justifiable by neighborhood standards, and its construction insured that School 64 (99.5% Negro in 1968-69) would remain virtually all Negro, as it in fact has. A new School 2 (90.4% white in 1958-59) was completed in October, 1958, containing twenty classrooms, while nearby School 40 was all Negro.

[64] Of the various types and sizes of multi-district junior high schools established in the system since 1954, only one has involved the assignment of Negro majority and white majority schools to the same junior high school.

and constructed where they have served predominantly white student populations.[65]

The Board has perpetuated segregation by transporting students from overcrowded schools of one race to schools of the same race rather than to available nearby schools of the opposite race. In contrast to the current local and national hullabaloo about bussing, the Board's minutes record no citizen protests to the bussing of white students to white schools.

The Board has also perpetuated segregation in the assignment of special education classes. Specifically, it has maintained predominantly Negro and predominantly white special education departments at contiguous Negro and white schools and has shifted special education classes between schools with a resultant increase in segregation.[66]

Special education classes often enroll students from a wider area than the normal attendance zone. Thus they can be shifted between several schools in that wider area to relieve overcrowding where necessary. The Board has shifted these classes in some instances and failed to shift them in other instances, always with a resulting increase in racial segregation.

During the 1960's the Board adopted a "Shortridge plan" to prevent Shortridge High School from becoming

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[65] The two most recently constructed high schools in the city (John Marshall and Northwest) have been built on the extreme northeastern and northwestern areas of the city, where the Board knew they would serve virtually all-white areas. Both of these schools have in fact reinforced the growing racial isolation of the inner city.

[66] An all-Negro special education department was maintained at Attucks while an integrated department was maintained at Wood through most of this period since Wood was established in 1953. All-Negro and all-white departments have coexisted in virtually all-Negro School 64 and neighboring predominantly white School 21 almost continuously since September, 1957. Predominantly Negro special education classes exist on the west side at predominantly Negro Schools 63, 52, and 75, while predominantly white classes are housed at nearby predominantly white Schools 30 and 16.

an all-Negro school. This plan had the immediate effect of reducing the number of Negro students in Shortridge, many of whom subsequently attended Attucks. No steps were taken prior to the filing of this suit, however, to desegregate Crispus Attucks, and an addition to Attucks in 1966 coupled with the effect of the Shortridge plan insured the continuation of segregation at Attucks.[67]

Some of the Board's 1954-1968 segregation practices are evident in simple boundary changes. For example, in 1962-63, School 69 was 57.95% Negro and School 11, its northern neighbor, was 100% white. A housing facility study in February, 1963, noted that, with respect to School 69:

> "Census figures for the district indicate a slight decrease during the next five years. The nature of the district is changing considerably, which may cause a further increase; however, serious overcrowding is not anticipated in this district in the next five years."

Despite this assessment, the School 69-School 11 boundary was altered three months later and an all-white area in the School 69 district north of 38th Street was transferred to all-white School 11.[68] School 69's Negro percentage immediately rose to 72.9

According to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation.

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[67] Because of the small size of the Attucks site (8.4 acres), a waiver had to be secured from the State Board of Education. This waiver was obtained, with the proviso that no more than 2,200 students attend Attucks; nevertheless, in 1967-68 Attucks enrolled 2,394 students, 2,393 Negro and one white.

[68] In a letter to parents in this area, an Assistant Superintendent justified the boundary change because of "crowded conditions" at School 69.

The results of all of the foregoing policies, coupled with the restrictive housing policies of the entire Metropolitan Area, are clear: since 1954 the percentage of Negro students in the system has increased from 20 to 36, and the segregation has likewise increased. The number of 90% or more Negro schools has risen from thirteen to twenty-five. In 1954-55, 85.9% of the Negro elementary students were in majority Negro schools; in 1968-69, the percentage had risen to 88.2. In 1968-69 Crispus Attucks was 99.8% Negro.[69] Faculty and staff were assigned on a racially segregated basis, meaning that Negro schools had all-Negro, or virtually all-Negro faculties, and vice versa. In short, nothing really changed during the 1954-1968 period, and the Indianapolis school system on the date this suit was filed remained segregated by operation of law.

VI. BOARD POLICIES SINCE MAY 31, 1968

In May, 1968, after the Board received notification of the plaintiff's intention to file suit if deficiencies were not corrected,[70] it contracted with Indiana University to study elementary school boundaries "for the purpose of determining the best method of achieving maximum desegregation of all schools * * * under the neighborhood concept."[71] A "Special Study Committee" of independent consultants was formed, which issued its report in April, 1969, making no recommendations for the promotion of integration through boundary changes. The activities of this Committee may best be characterized as farcical, since

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[69] The first white attended that school in 1967-68, when one white student was enrolled.

[70] This was a "notice letter" under Title IV of the Civil Rights Act of 1964; 42 U. S. C. § 2000c-6.

[71] The so-called "neighborhood concept" was not adopted as a formal policy until 1965 and, as has been demonstrated, has proved meaningless in practice. Its principal use is as a slogan for those opposed to bussing across racial lines.

according to the testimony of one of its members, it was not furnished with data as to the racial composition of the students or faculty at any school.

In February, 1969, the Board requested a study of, and recommendations for, the desegregation of the Indianapolis schools in a letter to the Office of Education, United States Department of Health, Education and Welfare (hereinafter "HEW"). A team of six educators from HEW visited the system for four days in March, 1969, and prepared a series of recommendations for both the elementary and high schools in the system.[72] These recommendations were presented to the Board on April 18, 1969. On June 17, 1969, the Board rejected the HEW recommendations, finding that they were not a "satisfactory or workable solution to the integration problem of the schools."[73]

In the same statement rejecting the HEW recommendations, the Board called for the appointment of a community-based committee to recommend programs to improve integration, with the first priority directed toward secondary schools.[74] The committee was formed and in October, 1969, filed majority and minority reports. The majority recommended the construction of a new Crispus Attucks (presumably, although not explicitly stated,

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[72] Mr. Johnson, the leader of this team, testified that he recognized that time was too limited to draw a comprehensive plan; therefore, the recommendations of the team were threefold: (a) to study the possibility of grade reorganization to desegregate the system; (b) the submission of a series of specific reorganizations for specific schools to be implemented by September, 1969, as examples of methods of desegregation and as an act of good faith by the Board; and (c) general recommendations for the amelioration of segregation at Crispus Attucks.

[73] However, a study of the feasibility of the HEW recommendations undertaken by the Board had concluded that, with respect to the elementary schools, all were feasible except for an alternate plan to desegregate School 64 and the plan to desegregate Schools 43 and 66.

[74] Specifically, the committee was to recommend solutions to "the problem presented by Crispus Attucks High School as it now exists."

racially desegregated) and also recommended free transfers for high school students regardless of assignment.[75]

Soon after this report, the Superintendent established a staff committee to treat the problem of the desegregation of Attucks. This committee recommended the construction of a new Attucks and the phase-out of the present Shortridge and Attucks. The Board ultimately rejected the proposed phase-out of Shortridge, but directed the Superintendent to search for a site for the new Attucks; no new site has been found.

During the 1970-71 school year, ninth graders assigned to Attucks under a revised feeder system (which desegregated this ninth grade class) attended school at Northwest High School and the Tudor Hall School.[76] Because no site has been found available for a new Attucks, the defendants plan to assign desegregated freshman and sophomore classes to the present Attucks campus in September, 1971. Grades 11 and 12 will remain virtually all Negro, and if this grade-a-year plan is continued, Attucks will remain partially segregated until September, 1973.

During the 1967-68 school year, the School Board decided to establish a middle school (to be known as the Forest Manor Middle School) housing grades 6, 7, and 8 and serving an area comprising the attendance zones of Schools 1, 71, and 73, each of which elementary schools was then, and is now, severely overcrowded. The building of the Forest Manor Middle School was not begun in 1968,

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[75] The minority recommended enrichment of the educational program at Attucks and free choice in high school student assignment. The committee submitted no further reports, and did not consider elementary school desegregation.

[76] The Tudor Hall School was purchased by the Board for eventual use as a special education facility. The State Superintendent objected to more than 650 students being housed on that site, so part of the Attucks desegregated freshman class was assigned to Northwest High School.

as planned, but the project has been revived, and the School Board is on the point of awarding contracts for the construction of the Forest Manor Middle School. The Board's plans for the utilization of this middle school are being reconsidered, because of plaintiff's objections to its proposed use and location. During the 1970-71 school year the percentage of Negro students at Schools 1, 71 and 73 was 91.4, 92.6, and 69.6, respectively, and the proposed location of the Forest Manor school is in a predominantly Negro residential area. It is apparent that, as matters stand, the proposed school would tend to perpetuate segregation.

The Board adopted a majority-to-minority transfer provision on June 30, 1970. For the 1970-71 school year approximately 400 high school and 50 elementary school students transferred under this provision, and at the time of trial 300 students had applied for such transfers for the 1971-72 school year.[77]

Since this suit was filed the Board has provided various school services on a nondiscriminatory basis.[78] Transfer policies have been administered so as not to increase segregation. A black history curriculum has been developed. Efforts have been made to recruit additional Negro faculty members, and Negro professional employees have been promoted to responsible positions in the central administrative office. A resolution adopted December 8, 1970, commits the Board to a program for the integration of

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[77] Under this provision, students can transfer from a school in which their race is in a majority to a school in which their race is in a minority. The transfers are contingent, under the terms of the policy, on the availability of space, and no transportation is provided. No transfers are accepted under this provision after school has been in session two weeks in September.

[78] Among these have been special and social services, lunch programs, libraries, and a program to combat dropouts.

administrative staffs (including the coaching staff) in each high school.

In October, 1970, the Board entered into a contract with the Office of Education, HEW, under which the latter provided funds for it to employ "advisory specialists" to prepare desegregation plans and in-service training programs for the Indianapolis system. Two such advisory specialists were employed,[79] and presented four plans to the Board on April 1, 1971. Three of these plans treated only eleven all-black, or virtually all-black schools, while the fourth, and recommended plan desegregated every school in the system. On May 25, 1971, the Board rejected all plans, noting that the trial in this cause was to commence July 12, 1971. It thus appears that the Board, having taken some steps toward rectifying its previous failure to comply with *Brown II*, is unwilling to proceed further unless directed to do so by the Court.

VII. EXTERNAL PROBLEMS FACING THE BOARD

Despite the fact that the Board, through the years, has consistently employed policies and practices causing and maintaining racial segregation in the School System under its control, it is only fair to say that various factors not of its own making have contributed to that result.

A. Changes in Racial Characteristics of School City

The racial characteristics of the School City changed significantly during the period 1954 through 1970. The number of Negroes residing in the School City increased rapidly, both absolutely and proportionately to the entire

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[79] Both of these specialists were already employees of the Indianapolis system: one was a former principal and consultant, while the other was a former teacher and had held an administrative position in the central office.

population of the School City. The number of areas of the School City in which significantly large groups of Negroes resided increased similarly. The pattern of the change in the location of black residential areas was one of expansion from the center of the School City toward its boundaries. While the Negro population was increasing within the School City, the white population within the School City was decreasing rapidly, and concurrently, the white population in Marion County outside the School City was increasing rapidly.[80]

In 1960, the population of Center Township (all of which, except a small part of Beech Grove, lies within the School City) was 333,351, of which 243,448 (73%) were white and 84,439 (26.8%) were Negro; in 1970, the population of Center Township had declined to 273,598, of which 166,622 (61.2%) were white and 106,112 (38.8%) were Negro.

In 1960, the population of Marion County excluding Center Township was 364,216, of which 353,659 (97%) were white and 10,473 (2.9%) were Negro. In 1970, the population of Marion County excluding Center Township was 518,701, of which 488,538 (94%) were white and 28,342 (5.4%) were Negro. The data also show that, whereas 59% of the white population of Marion County lived outside Center Township in 1960, about 74.5% of that group lived outside Center Township in 1970.

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[80] As found in Section III-C, *supra*, discrimination against Negroes in the matter of housing, enforced or condoned by the City and State has been a major factor in confining the Negro to a compact, central area.

The areas of the School City in which the change in racial composition has been significant in the last ten year period include:

(1) An area bounded, generally, by 38th Street on the north, Arlington Avenue on the east, 21st Street on the south, and Boulevard Place on the west. The eastern part of this area is often referred to as "the Forest Manor area." The change in the racial composition throughout the area is reflected in the changes in the racial composition of several of the elementary schools which serve the area, which changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
1	0.16	91.4
11	0.0	32.5
51	5.09	78.7
53	0.21	32.6
60	44.55	99.6
66	0.44	86.1
69	31.31	98.5
71	2.92	92.6
73	10.73	69.6
76	53.61	99.0
83	(not open)	41.7
99	0.0	29.3
110	(not open)	98.4

(2) An area bounded on the north by 63rd Street (Broad Ripple Avenue), on the east by the tracks of the Monon Railroad, on the south by 38th Street, and on the

west by the Indianapolis Water Company canal, where similar changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
55	0.0	8.5
66	0.44	86.1
70	0.0	28.1
84	0.0	2.2
86	12.36	53.5

(3) Scattered areas, in each of which the population shift is reflected by a similar sharp change in the racial composition of elementary school population, which changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
27	45.20	87.3
38	38.63	91.90
45	28.19	98.00
75	24.82	77.50

At the beginning of the 1970-71 school year, the number of students enrolled in the elementary schools was 79,587, excluding students enrolled in the special education schools. During the 1970-71 school year, the total enrollment was reduced to 77,658; the difference of 1,929 between the October and June enrollment totals is the net result of a departure of 2,122 white students from the elementary schools and an inflow of 193 Negro students to the elementary schools. Of the 110 elementary schools, 13

showed gains, and 81 showed losses, in the number of white students enrolled during the 1970-71 school year.

B. Low-Rent Housing Projects

Low-rent housing projects within the School City have significantly affected the racial composition of the schools. A project typical of this kind is constructed at the periphpery of an established Negro residential area and, for that reason among others, attracts a Negro occupancy, which is eventually reflected in the racial composition of the school that serves the area in which the project is situated.

Such an effect is to be seen in several elementary schools, including: School 67, in which Negroes constituted 4% of the student body in 1968-69 and 30.9% in 1970-71, owing to the opening of Eagle Creek Village at Tibbs Avenue and Cossell Road; School 112, in which Negroes constituted 13.7% of the student body in 1968-69 and 42.9% in 1970-71, owing to the opening of Raymond Villa, at Raymond Avenue and Perkins Street; School 71, in which Negroes constituted 10.8% of the student body in 1965-66 and 92.6% in 1970-71, owing to the opening of Hawthorne Place at 32nd Street and Emerson Avenue; and School 99, in which there were no Negro students in 1968-69 and in which Negroes constituted 33.9% of the student body at the end of the 1970-71 school year, owing to the opening of Beechwood Gardens at 30th Street and Graham Avenue.

Housing projects of the kind just described not only have racial consequences for the schools; each of them tends to represent, as well, a demand for a significant amount of school space. Eagle Creek Village, Raymond Villa, and Beechwood Gardens necessitated additions to Schools 67, 112, and 99, respectively, each of which cost

about $1,300,000. Salem Village, at 30th Street and Baltimore Avenue, necessitated the construction of a complete school (School 110), which has served a virtually all-black student body since it was opened in 1966.[81]

C. Noncooperation of Local Officials

Some of the reasons why no new site for Attucks has been acquired are directly attributable to action or inaction on the part of certain agencies of the civil government of the City of Indianapolis. One possible site is a 54 acre, undeveloped tract at the southwest corner of the intersection of 38th Street and White River. Although a part of the land is low, there is more than adequate high ground for buildings, and the low ground is protected by a levee. This tract is owned by the City of Indianapolis, which could presumably make it available to the School City free under Indiana law,[82] or in any event make the transfer for a nominal price.[83] However, the City has declined to consider parting with the 54 acres, on the ground that it is needed for use as a nursery for the Department of Parks and Recreation. The City's sense of priorities strikes the Court as curious.[84]

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[81] The plaintiff United States of America, which of course sponsors federally supported housing projects, has suggested a finding that the locations of six of the ten projects opened in the School City since 1965 have tended to promote integration in those instances. There is insufficient evidence to support such a finding.

[82] See Acts 1957, Ch. 229, p. 501, as amended; Burns Ind. Stat. Ann. §§ 53-403, 53-404, I. C. 1971, 5-18-1-1, 5-18-1-2.

[83] The Court estimates that the cost of a school site in an appropriate location, if purchased on the open market, would run from at least $12,500 to $17,500 per acre.

[84] In addition to the fact that use of the White River tract as a nursery does not appear to be its highest and best use, it is also instructive to note that the Department has available for nursery purposes various parts of the 2,650 acre non-reservoir portion of its virtually undeveloped Eagle Creek Park. Note also that approximately half of the 54 acres would meet State per-pupil minimum land requirements (Footnote 60, *supra*), leaving the balance available for planting to trees and shrubs.

Another likely site for the new Attucks was determined to be a tract at 30th Street and Guion Road, and the Board acquired an option to purchase the tract. It then filed an application to have the land rezoned for school use, only to have its application denied by The Metropolitan Development Commission of Marion County, which asserts the right to control the use of all land in the county, including that proposed to be dedicated for public purposes.

D. Legislative Action Since 1949

As noted briefly above, the State's long time policy of *de jure* segregation obstensibly ended in 1949 with the passage of Chapter 186 of the Acts of that year.[85] The new policy of the State, as set out in the first section of the Act, was stated to be as follows:

> "It is hereby declared to be the public policy of the State of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunitites and facilities for all regardless of race, creed, national origin, color or sex; to provide and furnish public schools and common schools equally open to all and prohibited and denied to none because of race, creed, color, or national origin; to reaffirm the principles of our Bill of Rights, Civil Rights and our Constitution and to provide for the State of Indiana and its citizens a uniform democratic system of common and public school education; and to abolish, eliminate and prohibit segregated and separate schools or school districts on the basis of race, creed or color; and to eliminate and prohibit segregation, separation and discrimination on the basis of race, color or creed in the public kindergartens, common schools, public schools, colleges and universities of the state."

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[85] Note 50, *supra*.

Note that the State completely anticipated and completely adopted the holding in *Brown I* by a full five years. Because of *Brown I*, moreover, it is impossible for the State legally to change its professed policy, because that policy has now assumed the stature of a Constitutional imperative, far above the power of the State to detract therefrom. With these principles in mind, the Court examines certain post-1949 legislation enacted by the General Assembly.

Historically, it was well established by the common law of the State that whenever an incorporated city or town expanded its corporate limits, the school city or town succeeded to the powers and duties of the township trustee with respect to the administration of the public schools. In other words, the boundaries of a school city and of a civil city are coterminous.[86] This rule was recognized in a 1931 Act, pertaining to the defendant School Board, as follows: "In each civil city of this State having * * * more than three hundred thousand [300,000] inhabitants there shall be a common school corporation hereinafter called the 'school city' whose duties and powers shall be coextensive with the corporate boundaries of such civil city. * * *"[87] When such Act was amended in 1955 in order to increase the size of the Board, among other things, such provision remained unchanged.[88]

However, in 1961 the General Assembly crippled this policy by an Act which provided that, with respect only

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[86] Board of School Com'rs v. Center Twp., 1896, 143 Ind. 391, 42 N. E. 808; School Twp. of Allen v. School Town of Macy, 1887, 109 Ind. 559, 10 N. E. 578; School Town of Leesburgh v. Plain School Twp., 1877, 86 Ind. 582; State ex rel. Mt. Carmel School Corp. v. Shields, 1877, 56 Ind. 521; Carson v. State, to Use of Town of Hanover, 1867, 27 Ind. 465.

[87] Acts 1931, Ch. 94, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1948 Repl.), I. C. 1971, 20-3-11-1.

[88] Acts 1955, Ch. 123, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1968 Cum. Supp.).

to Marion County, the extension of the boundaries of a civil city by a civil annexation would work only a prima facie extension of the boundaries of the school city, and render such school city extension subject to a separate remonstrance by the losing school corporation.[89] Thus, for the first time, it became possible for the School City of Indianapolis, alone among the major school cities of the State, to have jurisdiction over a lesser territorial area than the corresponding civil city.

Even more grave in import are Chapters 52 and 173 of the Acts of the 1969 General Assembly. Section 3 of Chapter 52 amended Chapter 186 of the Acts of 1961 to abolish the concept that the school and civil cities in counties having a city of the first class[90] would have coterminous boundaries, and limited the School City of Indianapolis to enlarging its territory by one of the two methods authorized in the 1961 Act in addition to automatic prima facie extension on enlargement of the civil city: (1) by agreement with the school corporation losing territory, or (2) by unilateral annexation by the School City of all or part of the territory of another school corporation.[91] Both procedures are subject to remonstrance. Futher, said Section repealed Section 9 of Chapter 186 of the Acts of 1961 as to all enlargements of the School City claimed to have been made pursuant to civil city annexations and not yet finally effective. I. e., in cases where remonstrances and/or court actions were pending against School City annexations pursuant to Section 9 of the 1961 Act, the annexations were simply canceled by legislative fiat.

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[89] Acts 1961, Ch. 186, §§ 1, 9, 10; Burns Ind. Stat. Ann. §§ 28-2338, 28-2346, 28-2347 (1968 Cum. Supp.), I. C. 1971, 20-3-14-1, 20-3-14-10.

[90] Indianapolis is the only city of the first class in Indiana.

[91] Acts 1969, Ch. 52, § 3, p. 57; Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.), I. C. 1971, 20-3-14-9.

Chapter 173[92] is formally titled the "Consolidated First Class Cities and Counties Act," and is hereafter referred to by its more familiar name, "Uni-Gov." This Act purports, in general, to consolidate the civil governments of the former City of Indianapolis and of Marion County into a unified, metropolitan city government, with certain exceptions,[93] which expanded or consolidated city continues to be known as the City of Indianapolis.

The Uni-Gov Act provides expressly that "any school corporation, all or a part of the territory of which is in the consolidated city or county" shall not be affected by the Act.[94] Thus Uni-Gov leaves the defendant School City exactly where it found it: confined to an area in the central part of the consolidated City of Indianapolis, where it is surrounded by eight township school systems operating independently within the purportedly unified City, and by two additional independent school corporations operated by Beech Grove and Speedway City (hereinafter, in the aggregate, "outside school corporations"). For the 1969-70 school year these outside school corporations together had 73,205 students enrolled, of whom 2.62% were Negro, and together employed 3,037 teachers, of whom 15, or 0.49% were Negro.

The outside school corporations compete effectively with the School Board for teachers. Since the filing of this action, some white teachers employed by the Board and

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[92] Acts 1969, Ch. 173, p. 357; Burns Ind. Stat. Ann. §§ 48-9101—48-9507 (1970 Cum. Supp.), I. C. 1971, 18-4-1-1 to 18-4-5-4.

[93] The cites of Beech Grove and Lawrence ("excluded cities") and the incorporated town of Speedway City ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated city, but the voters of these communities are entitled to vote for candidates for the offices of mayor and city-county councilman of the consolidated city, was well as for the corresponding officials of their respective excluded city or town.

[94] Acts 1969, Ch. 173, § 314, p. 357; Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), I. C. 1971, 18-4-3-14.

requested to transfer to integrated schools have declined transfer and found havens in the outside schools. The outside schools have likewise contributed to the exodus of white students from the School City by accepting them for transfer, on payment of tuition.

Considering the history of segregation of the Negro in Indiana and in Indianapolis, the racial complexion of the outside school corporations and of the adjoining counties in the Indianapolis Metropolitan Area, the ongoing flight to the suburbs by the white population of the School City, and the various other factors above set out, the effect of the 1961 and 1969 Acts of the General Assembly referred to in this section may well have been to retard desegregation and to promote segregation. In other words, under previous Indiana law, which still applies to all cities except Indianapolis, civil annexation would automatically carry school annexation with it, and the chances of successful remonstrance against logical annexation by an expanding municipality, carrying with it the usual municipal services, would be virtually nil. Under the present law, if valid, the ability of the Board to expand its jurisdiction coterminous with the consolidated city, or for that matter to expand it at all, is likewise virtually nil, as a practical matter.

E. The Tipping Factor

The undisputed evidence in this case, agreed to by plaintiff's expert from the Office of Education, is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible. Therefore, resegregation rapidly occurs, and the entire central core of the involved city develops into a virtually all-Negro city within a city when, as in Indianapolis, the Negro residential area is

largely confined to a portion of the central city in the first place.

During the trial, this Court repeatedly attempted to cause the plaintiff United States of America to produce statistics from HEW showing comparative racial statistics for the school systems of the larger school cities of the nation before and after active desegregation efforts were commenced. The Court was advised that no such statistics were available, incomprehensible as that might seem considering that such Department is the Federal agency directly concerned with the problem.

However, according to HEW's news release of June 18, 1971, in evidence the percentage of Negro students in certain public school systems as of fall, 1970 was as follows (in order according to total pupils in system): New York 34.5; Chicago 54.8; Detroit 63.8; Philadelphia 60.5; Houston 35.6; Baltimore City, Maryland 67.1; Cleveland 57.6; Washington, D. C. 94.6; Memphis 51.5; St. Louis 65.6; Orleans Parish (New Orleans), Louisiana 69.5; Atlanta 68.7; Birmingham 54.6; Caddo Parish (Shreveport), Louisiana 49.0; Louisville 48.3; Richmond, Virginia 64.2; Gary 64.7; and Compton, California 82.0. In some of these cities an additional sizable percentage of the student population belongs to another minority group which historically has been, and still is subject to racial discrimination: those with Spanish surnames, presumably of Mexican or Puerto Rican descent. When these percentages are added, the total minority race percentage of pupils in such cities is as follows: New York 60.2; Chicago 64.6; Houston 50.0; and Compton, California 94.4. All of these school cities, as well as others which would be named,[95] appear to be completely

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[95] Strangely, the HEW release failed to list Newark, New Jersey, where the combined minority percentage is known to be at least 70.

beyond hope of meaningful desegregation, absent some dramatic change in their boundaries. In the absence of HEW statistics to the contrary, the Court infers that desegregation efforts have had much to do with the current figures as above quoted.

The brutal truth as to what may happen when a court and a school board undertake in good faith to apply across-the-board desegregation in situations when racial balances reach the tipping point is well illustrated in the rather poignant opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, Calhoun et al. v. Cook et al., 332 F.Supp. 804, handed down on July 28, 1971. Pointing out that Atlanta in 1961-62 was one of the first major southern cities officially abandoning the dual school system, it noted that in the ten year interim the balance has shifted from 70%-30% white to 70%-30% Negro, and that the remaining 30 whites were themselves confined to two areas. The court declined to order further enforced measures, as being futile.

VIII. CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action under Section 407 of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6) and under 28 U.S.C. § 1345.

2. Pursuant to the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964 this Court has jurisdiction to hear and to decide all issues concerning alleged racial discrimination in public education in the Indianapolis School System, including the defendant Board's policies with respect to assignment and transfer of students, the allocation of faculty and staff, the location and construction of schools, the transportation of students, and

the general educational structure and process. United States v. School District 151, N.D. Ill., 1968, 286 F.Supp. 786, aff'd 7 Cir., 1968, 404 F.2d 1125.

3. The Court having found for the plaintiff that the defendant School Board was on May 17, 1954, May 31, 1968, and as of the date of trial operating a segregated school system werein segregation was imposed and enforced by operation of law, the law is with the plaintiff. Therefore, the Board is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination (will) be eliminated root and branch." Brown v. Board of Education *(Brown II)*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; Green v. County School Board, 1968, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716.

4. All provisions of federal, state or local law requiring or permitting racial discrimination in public education must yield to the principle that such discrimination is unconstitutional; revisions of local laws and regulations and revision of school districts may be necessary to solve the problem. *Brown II.*

5. This Court has continuing jurisdiction to make and enforce such decrees in equity as are necessary to accomplish the above mentioned objective. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. Swann v. Charlotte-Mecklenburg Bd. of Ed. *("Swann")*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554.

IX. FURTHER PARTIES AND PROCEEDINGS

As noted herein, the percentage of Negro elementary pupils within the School City had reached 37.4 as of the

past school year, and was slowly rising. Fortunately, the change has not yet become a rout, and the Court recognizes that a substantial part of the increase during the past fifteen years has been caused by immigration from the Southern States, which has virtually ceased. The Court is further of the opinion that the white citizens of this community are less likely than those of certain of the cities listed in part VII hereof to succumb to the enslavement of unreasoning racial fears, and recognizes that there are many good reasons for moving to the suburbs which have nothing to do with this case.

Nevertheless, it is obvious that something more than a routine, computerized approach to the problem of desegregation is required of this Court, lest the tipping point be reached and passed beyond retrieve.[96] This is particularly true in the light of the dictum in *Swann* to the effect that "neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of students bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Put another way, the easy way out for this Court and for the Board would be to order a massive "fruit basket" scrambling of students within the School City during the coming school year, to achieve exact racial balancing, and then to go on to other things. The power to do so is undoubted. There is just one thing wrong with this simplistic solution: in the long haul, it won't work.

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[96] The plight of the Negro citizen, still striving for equality 352 years after Jamestown, recalls the familiar words of the Red Queen to Alice: "Now here, you see it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!" L. Carroll, Through the Looking-Glass.

With due regard for the opinions of the many other courts which have grappled with the problems here involved, and with full knowledge of the countless hours of research, heartache, and soul searching which have doubtless gone into them, this Court is compelled to say that the common characteristic of most of them is tunnel vision. In interpreting the mandate of *Green* "to come forward with a plan that promises realistically to work, and promises realistically to work *now*," they have tended to stress the same word stressed by the Supreme Court, and in doing so have focused exclusively on the school board defendant. If the school system involved is already at or near the tipping point, nothing is accomplished save the unfortunate results noted above in various of our major cities. As to the *Green* command, this Court prefers to stress its major thrust: promises realistically to *work*. (This Court's emphasis.)

Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County. Certain legal questions immediately spring to mind which cannot, or at least should not be answered without the joinder of additional parties to this action.

Some of these questions are as follows:

1. Are Chapter 186 of the Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969, or any of them, unconstitutional as tending to cause segregation or to inhibit desegregation of the Indianapolis School System?

2. If the answer to Question 1 is in the affirmative, did passage of the Uni-Gov Act automatically extend the boundaries of the School City coterminous with the boundaries of the Civil City, as provided generally by Indiana law?

3. If both of the foregoing questions are answered in the affirmative are Lawrence, Beech Grove, and Speedway city presently under the jurisdiction of the defendant Board, or does Uni-Gov merely have the effect of annexing the eight township school corporations?

4. Regardless of the answer to the first three questions, should the General Assembly, by appropriate legislation, provide for the creation of a metropolitan school district embracing all of Marion County, together with all or some substantial part of the other counties going to comprise the Indianapolis Metropolitan Statistical Area, in order to purge the State of its role in contributing to *de jure* segregation in the Indianapolis School System?[97]

5. If the answer to Question 4 is in the affirmative, and the General Assembly fails to act within a reasonable time, or in a reasonable way, does this Court have the power to create such a metropolitan school district by judicial decree?[98]

Other questions likewise require an answer:

6. Does the Metropolitan Development Commission of Marion County have the power to deny the School Board

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[97] The State has the undoubted power to abolish, consolidate, eliminate, or create new governmental corporations. Woerner v. City of Indianapolis, 1961, 242 Ind. 253, 177 N. E. 2d 34.

[98] Is there, for example, an analogy between the power of the Court in desegregation cases, and the power of the Court in cases involving legislative or congressional redistricting, both of which arise out of the equal protection clause of the Fourteenth Amendment? cf. Baker v. Carr, 369 U. S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; Reynolds v. Sims, 377 U. S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

its choice of sites for Crispus Attucks or other new schools? Put another way, does this Court have the power to override such Commission if it finds that its rulings interfere with desegregation?

7. Does this Court have the power to override rulings of the said Development Commission or of any other involved agencies with regard to the location of low-rent housing projects, if it finds that the locations of such projects interfere with desegregation, or tend to cause resegregation?

The plaintiff is ordered to proceed forthwith to prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations which would have an interest in questions 1-5, inclusive, and to seek such relief as to the plaintiff seems justified. The defendant is ordered to proceed similarly as to those agencies which would appear to have an interest in questions 6 and 7, joining them as third party defendants. Because of the interest of the State of Indiana in the constitutionality of its laws, its Attorney General should also be served by the plaintiff.

Nothing herein should be construed as limiting the parties to consideration of the seven questions above suggested. Other questions may well occur to them which would involve additional parties, and if so they should feel free to proceed accordingly and to seek whatever relief seems appropriate.

Further, it may be that the opinions herein expressed, the questions herein propounded, and the orders herein made will cause individuals or bodies politic to desire to intervene herein. Petitions for intervention will be given careful consideration.

X. ORDER OF THE COURT

Finally, what is to be done pending decision of the questions above set out? The order of the Court in this regard is as follows:

It is hereby ordered that the defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them, are permanently enjoined from discriminating on the basis of race in the operation of the Indianapolis School System.

It is further ordered that the defendants take, at a minimum, the following specified actions to fulfill their affirmative duty to achieve a nondiscriminatory school system:

(1) Immediately take steps to assign faculty and staff so that no school is racially identifiable from the racial composition of its faculty or staff. Mandatory assignments or reassignments are to be made if necessary, and the assignments to achieve full desegregation will be made prior to or with the opening of schools in September, 1971. This Court further notes that the evidence adduced in this cause shows that, in faculty and staff reassignment heretofore effected, these reassignments have tended to result in more experienced Negro faculty and staff being transferred and/or assigned to schools attended predominantly by white students and more inexperienced white faculty and staff being transferred and/or assigned to schools attended predominantly by Negro students. Defendants should, accordingly, redress or tend to redress this situation in making whatever assignments or reassignments that are necessary to comply with this order.

(2) Immediately continue with their plans to desegregate and relocate Crispus Attucks High School.

(3) Immediately amend the "majority-to-minority" transfer policy to conform to the requirements enunciated by the Supreme Court in *Swann*, so that such transfers are not to be dependent upon availability of space in the receiving school and so that transportation will be provided, upon request, to students making such transfers. Provided, however, that the Board may request authority to designate the transferee school or schools in the event that extreme diffussion of requests presents practical problems of transportation, or in the event that extreme concentration of requests threatens the racial stability of a given school, i.e., the tipping point factor.

(4) Immediately give all possible publicity to students and parents of students who may be eligible for transfer under (3), regarding the new policy.

(5) Immediately attempt to negotiate with the outside school corporations for possible transfer of minority race students to such outside schools, including high schools, for the coming school year.[99]

(6) Immediately resurvey the probable racial make-up of all schools for the 1971-72 school year, and take appropriate action to prevent schools, including high schools, now having a reasonable white-black ratio from reaching the tipping point. Transportation of students into or out of such schools shall be resorted to as required.[100]

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[99] If the outside school corporations have the capacity to accept transfer of white students, they have the capacity to accept minority race students. Further, the Board has available many portable classrooms and could, with a little imagination, "lend-lease" teachers, if necessary.

[100] This Court regards the outcry made in some quarters against "bussing" as ridiculous, in this age of the automobile. Most students in the outside school corporations have been bussed for years, with never a complaint against bussing per se. Students required to be bussed could be required to walk to their former schools for ease of pick-up and speed in delivery.

(7) Immediately cease and desist from going forward with construction of the Forest Manor School until the Court hears further evidence on this subject.

It is recognized that the orders thus far made will not result in significant desegregation of majority-black schools immediately, unless the voluntary transfer and outside school corporation transfer policies are unusually successful. It is also recognized that mandatory transfers to maintain stability pursuant to subparagraph (6) may largely involve Negro students, as is certain with regard to transfers to the outside school corporations. Neither of these facts seems "fair" in a theoretical sense, and have caused the Court a great deal of concern. However, there is a limit to what can be accomplished at one time, and final plans cannot be made until answers are found to the seven legal questions posed. Determination of such questions will be expedited to the utmost degree consistent with due process.

Meanwhile, the defendants are directed to file, on or before September 3, 1971, the plans they propose for the 1971-72 school year pursuant to the within order and on their own initiative, with the usual copies to counsel and amicus curiae, who shall have the right to object thereto and/or to make their own suggestions within ten days thereafter. Such plans shall include their current proposals regarding the site of and assignment of pupils to the proposed Forest Manor Middle School.

It is finally considered and adjudged that the defendant School Board pay the costs of this action.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of live, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Rights reserved to states or people.—The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

§ 1. Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. **Representatives—Power to reduce apportionment.** —Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. **Disqualification to hold office.**—No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies

thereof. But congress may by a vote of two-thirds of each house, remove such disability.

§ 4. Public debt not to be questioned—Rebel debts and claims not to be paid.—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

§ 5. Power to enforce amendment.—The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. 2000c

§ 2000c. Definitions

As used in this subchapter—

(a) "Commissioner" means the Commissioner of education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, pro-

vided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system. Pub.L. 88-352, Title IV, § 401, July 2, 1964, 78 Stat. 246.

§ 2000c-6.

(a) Whenever the Attorney General receives a complaint in writing—

> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, . . .

and the Attorney General believes the complaint is meritorious and certifies . . . that the institution of any action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order

seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

ARTICLE II.—POWERS AND PURPOSES OF SCHOOL CORPORATIONS

28-1709

Each school corporation shall have the power to conduct an educational program for all children resident within such school corporation in kindergarten and in grades 1 through 12, to conduct an educational program for adults and children over the age of fourteen [14] years not attending such first mention program, to provide in either such program instruction in vocational, industrial or manual training, to provide a special education program for handicapped children as permitted by law, to provide libraries for the schools of such school corporation, to provide public libraries open and free for the use and benefit of the residents and taxpayers of the school corporation where permitted by law, to provide vacation school and recreational programs, and to conduct such other educational or other activities as shall be permitted or required to be performed by law by any school corporation. Such powers shall be construed as purposes as well as powers. [Acts 1965, ch. 307, § 201, p. 894.]

28-1710

In carrying out the school purposes of each school corporation, its governing body acting on its behalf shall have the following specific powers:

(1) In the name of the school corporation to sue and be sued and to enter into contracts in matters permitted by applicable law.

(2) To take charge of, manage and conduct the educational affairs of the school corporation and to establish, locate and provide the necessary schools, school libraries, other libraries where permitted by law, other buildings, facilities, property and equipment therefor.

(3) To acquire, construct, erect, maintain, hold, and to contract for such construction, erection or maintenance, of such real estate, or real estate improvements, or any interest in either, as the governing body deems necessary for school purposes, including but not limited to buildings, parts of buildings, additions to buildings, rooms, gymnasiums, auditoriums, playgrounds, playing and athletic fields, facilities for physical training, buildings for administrative, office, warehouse, repair activities, or housing of school owned buses, landscaping, walks, drives, parking areas, easements and facilities for power, sewer, water, roadway, access, storm and surface water, drinking water, gas, electricity, other utilities and similar purposes, by purchase, either outright for cash (or under conditional sales or purchase money contracts providing for a retention of a security interest by seller until payment is made or by notes where such contract, security retention or note is permitted by applicable law), by exchange, by gift, by devise, by eminent domain, by lease with or without option to purchase, or by lease under Acts 1947, ch. 273 [§§ 28-3901—28-3916], Acts 1953, ch. 264 [§§ 28-3920—28-3922], Acts 1963 Spec. Sess., ch. 23 [§ 28-3910] and Acts 1957, ch. 275 [§§ 28-3923—28-3933]; and to repair, remodel, remove or demolish any such real estate, real estate improvements, or interest in either, as the governing body deems necessary for school purposes, and to contract therefor.

(4) To acquire such personal property or any interest therein as the governing body deems necessary for school purposes, including but not limited to buses, motor vehicles, equipment, apparatus, appliances, books, furniture and supplies, either by outright purchase for cash, or under conditional sales or purchase money contracts providing for a security interest by the seller until payment is made or by notes where such contract, security retention or note is permitted by applicable law, by gift, by devise, by loan or by lease with or without option to purchase; and to repair, remodel, remove and demolish such personal property. All purchases and contracts delineated under the powers given under subsections (3) and (4) of this section shall be subject solely to applicable law relating to purchases and contracting by municipal corporations in general and to the supervisory control or agencies of the state as provided in sec. 203 [§ 28-1711] hereunder.

(5) To sell or exchange any of such real or personal property or interest therein, which in the opinion of the governing body is not necessary for school purposes, in accordance with the provisions of article V [§§ 28-1741—28-1745] of this act, or to demolish or otherwise dispose of such property if in the opinion of the governing body it is not necessary for school purposes and is worthless and to pay the expenses for such demolition or disposition.

(6) To lease any school property for a rental which the governing body deems reasonable or to permit the free use of school property for civic or public purposes; Provided, however, That such leasing or use shall not interfere with the primary use of such school property for school purposes and shall be at such time or times as such property shall not be used or needed to be used for school purposes.

(7) To employ, contract for and discharge superintenddents, supervisors, principals, teachers, librarians, business managers, superintendents of buildings and grounds, janitors, engineers, architects, physicians, dentists, nurses, accountants, teacher aides performing non-instructional duties, educational and other professional consultants, data processing and computer service for school purposes, including but not limited to the making of schedules, the keeping and analyzing of grades and other student data, the keeping and preparing of warrants, payroll, and similar data where approved by the state board of accounts as provided below, and such other personnel or services, all as the governing body considers necessary for school purposes; to fix and pay the salaries and compensation of such persons and such services; to classify such persons or services and to adopt schedules of salaries or compensation; to determine the number of such persons or the amount of services thus employed or contracted for; and to determine the nature and extent of their duties.

The compensation, terms of employment and discharge of teachers shall, however, be subject to and governed by the laws relating to employment, contracting, compensation and discharge to teachers; and the compensation, terms of employment and discharge of bus drivers shall be subject to and shall be governed by any laws relating to employment, contracting, compensation and discharge of bus drivers. The forms and procedures relating to the use of computer and data processing equipment in handling financial affairs of such school corporation shall be submitted to the state board of accounts for approval to the end that such services shall be used by the school corporation when the governing body determines that it is in the best interests of the school corporation while at

the same time provided reasonable accountability for the funds expended.

(8) When the governing body by resolution deems a trip by an employee of the school corporation or by a member of the governing body to be in the interest of the school corporation, including but not limited to, attending meetings, conferences or examining equipment, buildings and installations in other areas, to permit such employee to be absent in connection with such trip without any loss in pay and to refund to such employee or to such member his reasonable hotel and board bills and necessary transportation expenses; and to pay teaching personnel for time spent in sponsoring and working with school related trips or activities.

(9) To transport children to and from school, when in the opinion of the governing body such transportation is necessary, including but not limited to considerations for the safety of such children and without regard to the distance they live from the school, such transportation to be otherwise in accordance with the laws applicable thereto.

(10) To provide a lunch program for a part or all of the students attending the schools of the school corporation, including but not limited to the establishment of kitchens, kitchen facilities, kitchen equipment, lunch rooms, the hiring of the necessary personnel to operate such program and the purchase of any material and supplies therefor, charging students for the operational costs of such lunch program, fixing the price per meal or per food item; to operate such lunch program, as an extra-curricular activity, subject to the supervision of the governing body; to participate in any surplus commodity or lunch aid program.

(11) To purchase textbooks, to furnish them without cost or to rent them to students, to participate in any textbook aid program, all in accordance with applicable law.

(12) To accept students transferred from other school corporations and to transfer students to other school corporations in accordance with applicable law.

(13) To levy taxes, to make budgets, to appropriate funds and to disburse the moneys of the school corporation in accordance with the laws applicable thereto; and to borrow money against current tax collections and otherwise to borrow money, in accordance with the provisions set out under article IV [§§ 28-1727—28-1736] of this act.

(14) To purchase insurance relating to the liability of the school corporation or its employees in connection with motor vehicles or property and for any additional coverage to the extent permitted and in accordance with the provisions of Acts 1941, ch. 52 [§§ 39-1818—39-1820]; to purchase additional insurance protecting the school corporation and members of the governing body, employees, contractors or agents of the school corporation from any liability, risk, accident or loss related to any school property, school contract, school or school related activity, including but not limited to the purchase of insurance protecting such persons against false imprisonment, false arrest, libel or slander for acts committed in the course of their employment, insurance protecting the school corporation for fire and extended coverage and other casualty risks, to the extent of replacement cost, loss of use and other insurable risk relating to any property owned, leased or held by the school corporation.

(15) To make all applications, to enter into all contracts and to sign all documents necessary for the receipt

of aid, money or property from the state government, the federal government or from any other source.

(16) To defend any member of the governing body or any employee of the school corporation in any suit arising out of the performance of his duties for, or employment with, the school corporation, provided the governing body by resolution determined that such action was taken in good faith; and to save any such member or employee harmless from any liability, cost or damage in connection therewith, including, but not limited to the payment of any legal fees, except where such liability, cost or damage is predicated on, or arises out of the bad faith of such member or employee, or is a claim or judgment based on his malfeasance in office or employment.

(17) To prepare, make, enforce, amend and/or repeal rules, regulations and procedures for the government and management of the schools, property, facilities and activities of the school corporation, its agents, employees and pupils and for the operation of its governing body, which rules, regulations and procedures may be designated by any appropriate title such as "policy handbook," "by-laws," "rules and regulations."

(18) To ratify and approve any action taken by any member of the governing body, any officer of the governing body or by any employee of the school corporation after such action is taken, if such action could have been approved in advance, and in connection therewith to pay any expense or compensation permitted under this act [§§ 28-1701—28-1761] or any other law.

(19) To exercise any other power and make any expenditure in carrying out its general powers and purposes provided in sec. 201 [§ 28-1709] or in carrying out the powers delineated in this sec. 202 which is reasonable

from a business or educational standpoint in carrying out school purposes of the school corporation, including but not limited to the acquisition of property or the employment or contracting for services, even though such power or expenditure shall not be specifically set out herein; and the specific powers set out in this section shall not be construed to limit the general grant of powers provided in sec. 201 [§ 28-1709] except where a limitation is set out in this act by specific language or by reference to other law. [Acts 1965, ch. 307, § 202, p. 894.]

28-1711

All powers delegated to the governing body of each school corporation under sec. 201 [§ 28-1709] or 202 [§ 28-1710] shall be subject to all the laws subjecting the school corporation to regulation by state agencies, including but not limited to the superintendent of public instruction, state board of accounts, Indiana state police, state administrative building council, state board of tax commissioners, stream pollution control board, state school bus committee, state fire commission, state board of health and any local governmental agency to which the state has been delegated a specific authority in matters, other than educational matters and other than finance, including but not limited to planning commissions, zoning boards and boards dealing with health and safety. [Acts 1965, ch. 307, § 203, p. 894.]

CONSOLIDATED FIRST-CLASS CITY AND COUNTIES ACT ("UNI-GOV")

IC 18-4-1-1

This act [chs. 91-95 of this title] shall be known and may be cited and referred to as the "Consolidated First Class Cities and Counties Act." [Acts 1969, ch. 173, § 101, p. 357.]

IC 18-4-1-2

As used in this article [chs. 91-95 of this title], the following terms shall have the following meanings:

(a) "City of first class" shall be a city of the first class as defined in IC 1971, 18-2-1-1 [§ 48-1201].

(b) "County" shall be any county in this state in which there is one [1] but not more than one [1] city of the first class and no city of the second class.

(c) "First class city" shall be the city of the first class located in a county.

(d) "Excluded city" shall mean any city, other than a first class city in the county, having a population in excess of five thousand [5,000] inhabitants according to the last preceding United States decennial census or any town in the county having a population in excess of five thousand [5,000] inhabitants according to the last preceding United States decennial census: Provided, That no city or town which has been recognized by law prior to January 1, 1973, to be an excluded city shall have its status affected by the application of this definition.

(e) "Included town" means any town having a population of less than five thousand [5,000] inhabitants according to the last preceding United States decennial census, all or any part of which is located in the county.

(f) "Consolidated city" shall be a body corporate, created by this article, and including within its boundaries all of the territory of a first class city and of the county, except for the territory located in excluded cities: Provided, however, That certain departments and special taxing districts of the consolidated city may have jurisdiction as provided in this article in territory greater or less than

such territorial boundaries. The consolidated city shall be a city and shall be a city of the first class within the meaning of all laws of the state.

(g) "Mayor" shall be the chief executive officer of the consolidated city with the powers provided herein.

(h) "City-county council" shall be the principal legislative body of the consolidated city and of the county with the powers provided in this article.

(i) "Departments" of the consolidated city and "divisions[''] of such departments are organizational units of the consolidated city, the chief executive officers of which have the duties and powers assigned or authorized to be assigned under this article. The chief executive officers of each department and any division thereof shall, except where they are otherwise styled in this article, be known respectively as "director" and "administrator."

(j) "Member" shall refer to the member of any council, board or commission set up hereunder; unless otherwise styled the presiding officer thereof shall be the chairman.

(k) A "special taxing district" of the consolidated city(,) shall be a district of less, equal or greater territorial limits than the boundary of the consolidated city, in which the property owners thereof bind themselves, pursuant to the procedures authorized in this article or heretofore authorized by applicable law, for the construction and maintenance of a local public improvement for the use of those who receive the benefit thereof; and projects may include, but shall not be limited to the construction of storm sewers, sanitary sewers, flood control, drainage and watercourse improvements, parks redevelopment projects, thoroughfares, roads and any other project

permitted under applicable law for a special taxing district of a city of the first class or the consolidated city.

(l) A "special service district" of or operating in connection with the consolidated city shall be a district within the consolidated city or the county formed, created or authorized to be created under this article for the purpose of providing the property owners therein with a service or services; it shall be administered under the administrative structure of the consolidated city in accordance with this article, but shall be a separate body corporate, without, however, the power to issue general obligation bonds.

(m) A "special service district council" shall be composed of all the members of the city-county council elected from an electoral district consisting of the entire county, provided sixty per cent [60%] or more of the population in the county is encompassed within the territorial limits of said district. Such council shall also consist of any member of the city-county council elected from a single electoral district under IC 1971, 18-4-3-6 [§ 48-9206] with fifty per cent [50%] or more of its population within the territorial limits of said special service district.

Where the population of a special service district is less than sixty per cent [60%] of the entire county at any time, the members elected from the electoral district consisting of the entire county shall cease to be members of the special service district council. Where the population of a portion of a special service district within a single electoral district falls below, or rises above, such fifty per cent [50%], the members shall cease to be, or shall become, respectively, a member of the special service district council. Such special service district council shall also include

members who are appointed to fill vacancies in any district from which any special district council member was elected.

(n) Where any employee, officer or member of a board or commission serves as "at the pleasure of" or "may be removed by" any appointing or hiring officer, employee or body, such person shall have no relief judicial or otherwise by reason of his termination or removal.

(o) Reference to "law" or "laws" shall mean the applicable statutes, including but not limited to this article, and any regulations related to such statutes, adopted before or after the effective date [January 1, 1970] of this article, on any subject, as for example, in the phrases "in accordance with applicable law," "permitted by law" or "authorized by law."

(p) A reference to any statute by the year adopted and the chapter number, as for example, Acts 1905, c. 129, or to a section of any statute, as for example, Acts 1905, c. 129, s. 53, or to a title, article, chapter or section of this code, shall refer to such act or section, or to such title, article, chapter, or section, any amendments thereto, in this act or otherwise and any statute or statutes or code sections which repeal, supplement or supersede such statute or section, or such title, article, chapter or section, adopted before or after the effective date [January 1, 1970] of this article and code.

(q) All references to "article" contained herein at the time this code was adopted shall refer to "article" as defined in Acts 1969, chapter 173, section 102(q). Any reference to "article" in any amendment adopted after the original adoption of Indiana Code 1971 and as used herein shall refer to title 18, article 4 of this code.

(r) The "effective date of this act" shall refer to the effective date for the taking effect of its various sections or articles provided in chapter 15 [§§ 48-9101, note, 48-9145] of this article. [Acts 1969, ch. 173, § 102, p. 357; 1971, P. L. 258, § 1, p. 989; 1973, P. L. 174, § 1, p. 869.]

IC 18-4-1-3

At the time or times provided in Article XV [§ 48-9101 note] of this act: a consolidated city which shall be a municipal body corporate shall be formed in each county (as defined herein); the consolidated city, its departments, special taxing districts and special service districts shall have the territorial jurisdictions and the duties and powers provided in this act [chs. 91-95 of this title] and the first class city shall be merged into the consolidated city and the first class city shall be abolished as a separate entity. [Acts 1969, ch. 173, § 103, p. 357.]

IC 18-4-1-4

The consolidated city shall be known as "City of ————————." In such blank shall be inserted the name of the first class city. [Acts 1969, ch. 173, § 104, p. 357.]

ARTICLE II. POWERS OF THE CONSOLIDATED CITY

IC 18-4-2-1

The consolidated city and its departments, and its special taxing districts and special service districts where powers are delegated to them under this act [chs. 91-95 of this title], shall have the powers set out in the subsequent sections of this article and otherwise provided in this act. The consolidated city and its special service districts shall be municipal corporations with power to sue and be sued. [Acts 1969, ch. 173, § 201, p. 357.]

IC 18-4-2-2

Power to levy and collect taxes and assessments, to make budgets, to appropriate funds, to the extent and in the manner provided by applicable law. [Acts 1969, ch. 173, § 202, p. 357.]

IC 18-4-2-3

Power to levy and collect taxes on taxable privileges and license and regulate such privileges. [Acts 1969, ch. 173, § 203, p. 357.]

IC 18-4-2-4

Power to provide for the payment of the debts and expenses of the first class city, the special taxing districts, special service districts and any other governmental unit to which the consolidated city is a successor. [Acts 1969, ch. 173, § 204, p. 357.]

IC 18-4-2-5

Power to borrow money which is a general indebtedness of the consolidated city, an indebtedness of a special taxing district for a public improvement in accordance with applicable law, or an indebtedness to be paid out of revenues to be received by the consolidated city, any department, special taxing district or agency thereof; power to borrow money against current tax revenues; and power to borrow money in any other situation and in any other manner; all in accordance with laws applicable to cities of the first class and subject to the limitations of the constitution of the state of Indiana. [Acts 1969, ch. 173, § 205, p. 357.]

IC 18-4-2-6

Power for any public purpose and to carry out its other powers set out in this act [chs. 91-95 of this title]: to acquire real and personal property or any interest therein, either by purchase, construction, erection, gift, donation, grant, lease, exchange, eminent domain or otherwise; to hold, maintain and use such property or interest; and to dispose of such property or interest when it is no longer needed for public purpose, or when such disposal is desirable or required by the public interest, either by sale, lease, exchange, contract or otherwise. [Acts 1969, ch. 173, § 206, p. 357.]

IC 18-4-2-7

Power to take and appropriate real and personal property for any public purpose when the public necessity or convenience requires it, the taking to be in accordance with applicable law. [Acts 1969, ch. 173, § 207, p. 357.]

IC 18-4-2-8

Power to acquire, own and maintain public parks, playgrounds and other recreational facilities and equip and improve them with buildings and other suitable structures. [Acts 1969, ch. 173, § 208, p. 357.]

IC 18-4-2-9

Power to collect service charges for installation and operating expenses incurred in furnishing services beyond the limits of the consolidated city or any of its special taxing districts or special service districts [Acts 1969, ch. 173, § 209, p. 357.]

IC 18-4-2-10

Power to enter into contracts with other governmental entities and with private persons, firms or corporations, providing for the furnishing of or the acquisition and securing of services and material of all kinds, necessary or desirable in the public interest. [Acts 1969, ch. 173, § 210, p. 357.]

IC 18-4-2-11

Power to make regulations and take actions to promote the general public health, including but not limited to powers provided in Acts 1905, c. 129, s. 53 [§ 48-1407], except to the extent that any such power may be vested exclusively in another body, board or person under Acts 1951, c. 287 [§§ 35-902—35-950]. [Acts 1969, ch. 173, § 211, p. 357].

IC 18-4-2-12

Power to regulate businesses which may be noxious, dangerous or deleterious to the public interest, including but not limited to the powers set out in Acts 1905, c. 129, s. 53 [§ 48-1407]; power to require any person undertaking a dangerous improvement or activity to execute bonds with sufficient surety, conditioned that such person, or his agent, contractor or employee will pay all damages which may be sustained from work on such improvement. [Acts 1969, ch. 173, § 212, p. 357.]

IC 18-4-2-13

Power to take action and adopt regulations to preserve peace and good order, including but not limited to the powers set out in Acts 1905, c. 129, s. 53 [§ 48-1407]. [Acts 1969, ch. 173, § 213, p. 357.]

IC 18-4-2-14

Power to provide and maintain a system of pension and retirements for officers and employees. [Acts 1969, ch. 173, § 214, p. 357.]

IC 18-4-2-15

Power to fix the fares and rates to be charged for the carriage of persons or property by any vehicle held out to the public use for hire, except where such rates are controlled by the public service commission of the state of Indiana or other agency of the state, to require indemnity bonds issued by surety companies or indemnity insurance policies to be filed by the owners of such vehicle for the protection of such person for loss or injury to such person or property, and to make regulations with respect to the operation of such vehicles. [Acts 1969, ch. 173, § 215, p. 357.]

IC 18-4-2-16

Power to build, purchase, maintain, and operate sewers and sewage disposal systems, water-works, transportation facilities, and any other public utility, to fix rates and provide for the making of such charges and assessments as are deemed necessary for the proper furnishing of such services, except where such rates are controlled by the public service commission or any other agency of the state of Indiana, or to pay the costs and expenses thereof by taxation or assessment; and power to provide liens or penalties and withdrawal of service for refusal or failure to pay for utility services provided. [Acts 1969, ch. 173, § 216, p. 357.]

IC 18-4-2-17

Power to collect and dispose of garbage and other refuse and to regulate the collection and disposal of garbage and other refuse. [Acts 1969, ch. 173, § 217, p. 357.]

IC 18-4-2-18

Power to regulate the erection and maintenance of buildings and all other structures or appurtenances, to compel the owner to provide and maintain fire escapes and other safety features, and to provide fire districts or zones and building zones within the consolidated city, power to prohibit, regulate or suppress, or provide for the destruction, demolition and removal of any building or other structure which may be or become dangerous or detrimental to the public; power to make any inspection of any building, other structure or appurtenance, including but not limited to chimneys, gas pipes, water pipes, plumbing lines on private property or elsewhere; power on default of the owner to comply with such regulations to make the same at the owner's expense; power to authorize and require the inspection and licensing of steam boilers and elevators and to prohibit their use when unsafe or dangerous or when used without license; power to license and regulate staionary engineers; and power to require the issuance of permits before doing any work on any building, other structure or appurtenance thereto. [Acts 1969, ch. 173, § 218, p. 357.]

IC 18-4-2-19

Powers to regulate by license or otherwise contractors, plumbers and electricians in connection with their work. [Acts 1969, ch. 173, § 219, p. 357.]

IC 18-4-2-20

Power to establish a law enforcement and police department or division; power to establish a fire-fighting and prevention department or division; and power to provide the equipment, buildings, appurtenances and personnel necessary thereto. [Acts 1969, ch. 173, § 220, p. 357.]

IC 18-4-2-21

Power to require dealers to keep honest weights and measures, to regulate the sale of food products and to condemn such products, if unwholesome, and to provide for the inspection, weighing or measuring of lumber, building material, stone, coal, wood, fuel, hay, corn, grain and other products. [Acts 1969, ch. 173, § 221, p. 357.]

IC 18-4-2-22

Power to maintain, regulate, create, relocate, widen, remove obstructions from, dredge, straighten or change the channel of, dam, impound or otherwise control all rivers, streams, watercourses, waterways, ditches, drains, storm sewers, levees, dikes, retaining walls, and any other improvement designed to prevent damage from floods and to conserve water resources. [Acts 1969, ch. 173, § 222, p. 357.]

IC 18-4-2-23

Power to lay out, open, extend, widen, narrow, establish, change the grade of, separate the grade thereof, vacate, close, construct, reconstruct, maintain, pave, curb, gutter, adorn, repair, clean, light and otherwise improve streets, roads, thoroughfares, alleys, bridges and walkways; power to grant rights-of-way through the streets,

roads and over the bridges for the use of public utilities and to make curb cuts and any temporary use of the street as by vaults and lines underneath such street as now permitted by law. [Acts 1969, ch. 173, § 223, p. 357.]

IC 18-4-2-24

Power to regulate the operation of motor vehicles and exercise control over vehicular and pedestrian traffic, including but not limited to parking on public streets, thoroughfares, roads, alleys and walkways. [Acts 1969, ch. 173, § 224, p. 357.]

IC 18-4-2-25

Power to establish regulations governing land planning, subdivision control and zoning concerning the construction of improvements upon and the use of real estate by private persons or public bodies. [Acts 1969, ch. 173, § 225, p. 357.]

IC 18-4-2-26

Power to pass ordinances necessary for the health, convenience, safety and general welfare of the inhabitants; and to provide misdemeanor penalties for violation of any ordinance adopted pursuant to the authority of this article [chs. 91-95 of this title] or under applicable law; and further, to have the power to provide for and seek, in aid of ordinance enforcement, the equity power of injunctive relief. [Acts 1969, ch. 173, § 226, p. 357; 1971, P. L. 258, § 2, p. 989.]

IC 18-4-2-27

Power to set up within the limits of the consolidated city community councils in areas of the consolidated city, to determine their jurisdiction by defining their specific powers, and to determine the manner in which they shall

be governed, except as otherwise expressly provided by any law of this state relating to community councils. [Acts 1969, ch. 173, § 227, p. 357.]

IC 18-4-2-28

Power to employ, contract for and discharge professional and nonprofessional employees, consultants, data processing service and such other personal services as shall be necessary or desirable in the public interest, to fix and pay the salaries and compensation of such persons and such services, to classify such persons or services, to adopt schedules of salaries or compensation, to determine the number of such persons and the amount of services thus employed or contracted for, and to determine the nature and extent of the duties of any such person thus employed or service thus contracted for, power to establish with respect to any class of employees a system of employment, promotion, demotion, transfer, dismissal or compensation and qualification, to provide for security in employment with respect to all or certain classes of the employees of any department or division and to effect modern developments in the solution of personnel problems, including but not limited to establishment of positions for classification and recruiting in pay, filling positions by promotion, by recruitment and by transfer, matters of attendance and performance records, establishment of working conditions and regulation of temporary and permanent separation from service. [Acts 1969, ch. 173, § 228, p. 357.]

IC 18-4-2-29

Power to purchase insurance relating to the liability of the consolidated city, its special taxing districts or spe-

cial service districts, its departments, officers and employees, to the extent permitted and in accordance with the provisions of Acts 1941, c. 52 [§§ 39-1818—39-1820]; to purchase additional insurance protecting the consolidated city and such districts, officers and employees, contractors, and agents from any liability or risk or for accident or property or other loss, including but not limited to the purchase of insurance protecting against false imprisonment, false arrest, libel or slander, for acts committed by officers or employees in the course of their employment, insurance protecting the consolidated city and such districts for full coverage insurance and other casualty risks, to the extent of the replacement costs, loss of use or other insurable risk, relating to any property owned, leased or held by the consolidated city or such districts; power to purchase, participate, or enter into, Indiana public employees' retirement fund, any other retirement or benefit fund set up by the state or federal government, health, accident and life insurance and retirement policies systems, and programs, and to permit and make provision for employee participation therein. [Acts 1969, ch. 173, § 229, p. 357.]

IC 18-4-2-30

Power to make all applications, to enter into all contracts, and to sign all documents necessary for the receipt of aid, money or property from the state government, federal government or from any other source. [Acts 1969, ch. 173, § 230, p. 357.]

IC 18-4-2-31

Power to defend any officer, employee or agent of the consolidated city or its special taxing districts or special

service districts, arising out of the performance of his duties for, or employment with the consolidated city or such district, provided that the city-county council by resolution determines that such action or inaction was taken in good faith; and in such event power to save any such officer or employee harmless from any liability or damage in connection therewith, except where any such liability or damage is predicated on or arising out of bad faith of such officer or employee, or is a claim on a judgement based on his malfeasance in office or employment. [Acts 1969, ch. 173, § 231, p. 357.]

IC 18-4-2-32

Power to ratify and approve any action taken by the consolidated city or any special taxing district or special service district, or any officer or employee thereof, if such action could have been approved in advance. [Acts 1969, ch. 173, § 232, p. 357.]

IC 18-4-2-32.5

Power to lease city-owned property or ratify a lease of same for a period of time beyond any specific statutory time limitation for leasing property. Said lease or ratification is to be approved by the city-county council. [IC 1971, 18-4-2-32.5, as added by Acts 1973, P. L. 174, § 2, p. 869.]

IC 18-4-2-32.6

Power to transfer, create or terminate powers, responsibilities, obligations, liabilities and duties from or to a department, division or agency within the consolidated city; provided any such action must be by ordinance approved by the city-county council. However, this power shall not be applied to any constitutional office or any

municipal corporation, board, agency, commission or authority to the extent it is excepted from the operation of IC 1971, 18-4-3-14 [§ 48-9213]. [IC 1971, 18-4-2-32.6, as added by Acts 1973, P.L. 174, § 3, p. 869.]

IC 18-4-2-33

The consolidated city and, to the extent provided in this act [chs. 91-95 of this title], its special taxing districts and its special service districts shall have all of the powers of cities generally, of a city of the first class and of the mayor, common council, agencies, boards, commissions, departments, officers, special service districts, or special taxing districts of such cities or city of the first class, now or hereafter granted, and shall have all the powers granted in any other provision of this act; and the consolidated city shall have all powers which are not prohibited under the constitution of the state of Indiana, are not denied by this act or denied by an act of the general assembly to a consolidated city and are necessary or desirable in the public interest, subject in addition to the limitations set out in sections 234 and 235 [§§ 48-9144, 48-9146] of this act. [Acts 1969, ch. 173, § 233, p. 357.]

IC 18-4-2-34

The consolidated city and its special taxing districts and special service districts shall not exercise any power to annex any real estate beyond the territorial limits of the county. [Acts 1969, ch. 173, § 234, p. 357.]

IC 18-4-15-1

(a) Transfer of Territory. Real estate within the consolidated city and adjacent to an excluded city, and real

estate within an excluded city and adjacent to the consolidated city, may be disannexed from one such city and concurrently annexed to the other (herein termed a transfer of territory,) in accordance with the procedures of this section.

Fifty-one per cent [51%] of the owners of land in the area proposed to be transferred may file a petition for annexation of said land, to be described in the petition, to the acquiring city with the governing body thereof (council or town board) and shall promptly thereafter file a petition for disannexation of said land from the other city with the governing body of that city. Any land so proposed for transfer shall be reasonably compact in configuration and the boundaries thereof shall generally follow streets or other natural boundaries. Each city shall act upon the petition filed with it, and either approve or disapprove the same, within sixty [60] days from the date of filing. If each city approves the petition filed with it, the land involved shall, upon the effective date of the action taken by the latter to act, become a part of the acquiring city and cease to be a part of the other city. If the acquiring city does not approve the requested annexation, the proceedings shall thereby be terminated.

If the acquiring city approves the annexation, and the city from which disannexation is sought refuses to disannex or fails to act within the time provided, the petitioners may, within sixty [60] days thereafter, appeal such refusal to the circuit court of the county. The sole grounds for appeal shall be that the benefits to be derived by petitioners from the transfer outweigh the detriments to the city which has failed to approve disannexation. Such city shall be the party defendant in such action and the matter shall be tried by the court, without intervention of a jury, as other civil actions.

The court shall determine whether the standards and procedures of this section have been satisfied and whether such benefits outweigh such detriments. In the event the city from which disannexation is sought, or any department or district thereof, is furnishing sanitary sewer service or municipal water service within such territory, or otherwise has expended substantial sums for public facilities, excluding roads, for the special benefit of such territory, the court shall find in favor of the city which has not disannexed. If judgment is in favor of petitioners, the court may order disannexation and the transfer of territory shall take effect upon the date such order becomes final.

No petition to annex or disannex shall be filed or processed with respect to any land as to which transfer has been petitioned for and denied under the provisions of this section within the preceding three [3] years.

(b) Expansion of Included Towns. The territorial area of any included town within the consolidated city may be expanded by annexation pursuant to, and in accordance with all procedures prescribed by, Acts 1905, c. 129; and the powers of such town within any added territory shall be the same, and only the same, as is reserved to such included town by this act [chs. 91-95 of this title].

(c) Pending Litigation. Any territory within the county involved in any annexation ordinance adopted by the first class city or any excluded city, which ordinance is the subject of litigation or is not otherwise finally effective upon the effective date [January 1, 1970] of this act, shall be effected as follows:

(i) If the annexation is by the first class city and becomes finally effective after the effective date of this act,

it shall have the effect of expanding the police and fire special service districts.

(ii) Any territory involved in any such annexation proceeding by an excluded city shall, from and after annexation by such city is finally effective, be part of the excluded city. [Acts 1969, ch. 173, § 1501, p. 357.]

IC 18-4-2-35

All the powers of the consolidated city and of its special taxing districts and special service districts shall be subject to the following limitations:

(a) All such powers shall be subject to regulation by state agencies in accordance with applicable law, including but not limited to the state board of accounts, state highway commission, state administrative building council and state board of tax commissioners, stream pollution control board, state board of health and state department of natural resources.

(b) The consolidated city and its special taxing districts and special service districts shall have the power to levy, assess or collect taxes, to make assessments and to borrow money solel · in accordance with limitations provided in this act [chs. 91-95 of this title] and applicable law.

(c) The consolidated city shall not have the power (1) to provide as a penalty for the violation of any ordinance imprisonment in excess of six [6] months or a fine in excess of one thousand dollars [$1,000], except that a combination of a fine and imprisonment not exceeding such limits may be provided, or (2) to enact an ordinance or exercise the power dealing with the same subject matter as an act passed by the general assembly where such sub-

ject matter has been pre-empted by such act or if there is a direct and positive conflict with the provisions of such act.

No act of the general assembly, adopted before or after the passage of this act, shall be construed to pre-empt the subject matter of such act or to occupy the field in which such act operates so as to deny or supersede the power of the consolidated city or such districts, or to present such conflict: (1) unless there is a direct and positive conflict between the provisions of such act and any such ordinance or power to the extent that the two can not be reconciled or consistently stand together; (2) unless such act contains an express provision to such effect; (3) unless the provisions of such act are so comprehensive as to completely occupy the field of such subject matter; or (4) if an act of the general assembly, whenever adopted, specifically permits the adoption of such ordinance or the exercise of such power despite any act of the general assembly on the same subject matter. [Acts 1969, ch. 173, § 235, p. 357.]

IC 18-4-2-36

The powers of the consolidated city and its special taxing districts and special service districts shall be construed liberally in favor of the exercise of such powers. A specific enumeration of, or failure to enumerate, any particular power shall not be construed to limit any general power otherwise conferred in this act [chs. 91-95 of this title]. It is the intention of the legislature that any fair doubt as to the existence of any power in the consolidated city and its special taxing districts and special service districts shall be resolved in favor of each and that the consolidated city shall have full power and right to exercise all governmental authority necessary for the effective operation and conduct of government in the public interest of its inhabi-

tants, except as limited herein. [Acts 1969, ch. 173, § 236, p. 357.]

The provisions of IC 1971, 18-1-6-6 [§ 48-1506], 18-2-1.9 [§ 48-1222], 18-2-1-10 [§ 48-1233], 17-1-24-15, 17-1-24-16, 17-1-24-17, 17-1-24-18, 17-1-24-19, and 17-1-24-20 [§§ 26-516—26-521] shall not apply to the consolidated city or to the county. [Acts 1971, P. L. 258, § 16, p. 989.]

ARTICLE III.—OFFICERS OF THE CONSOLIDATED CITY AND THE COUNTY.

IC 18-4-3-1

The mayor shall be elected every four [4] years by all the voters in the consolidated city and the county voting for such office for a four [4] year term in accordance with the general election laws relating to the election of city officials, the first election to be held at the time of the primary and general election where city officials are elected under applicable law next following the creation of the consolidated city, the term to commence on January 1 following each such general election.

The term of the mayor of the first class city shall terminate upon the qualification for office of the mayor of the consolidated city.

The mayor shall be a registered voter, a citizen of the United States and a resident of the consolidated city for five [5] years prior to the time he is to take office. No mayor of the consolidated city elected after January 1, 1970 shall serve more than two [2] consecutive four [4] year terms. [Acts 1969, ch. 173, § 301, p. 357; 1973, P. L. 175, § 1, p. 874.]

IC 18-4-3-2

During any absence of the mayor from the county, or any incapacity of the mayor, he may designate the presi-

dent of the city-county council to be acting mayor, with all powers of the office. If the mayor is incapable of acting as mayor or of delegating his duties, the president of the city-county council shall automatically become acting mayor, with all powers of the office. [Acts 1969, ch. 173, § 302, p. 357.]

IC 18-4-3-3

If the mayor shall die, resign, remove his residence from the county during his term of office, be incapacitated to the extent that he is unable to perform his duties for a period in excess of six [6] months, or be removed from office, the office of mayor shall become vacant. A vacancy in the office of mayor shall be filled for the unexpired term by appointment by the city-county council of any person meeting the qualifications imposed by section 301 [§ 48-9201]. The city clerk, or upon his failure, the president of the city-county council, or upon the failure of both, the city-county council by resolution adopted by a majority thereof, shall call a special meeting of the city-county council within ten [10] days of any such vacancy for the purpose of appointing a new mayor. Until the vacancy is filled, the president of the city-county council shall be the acting mayor. At such meeting a vote of a majority of all members of the city-county council shall be required to appoint a new mayor. [Acts 1969, ch. 173, § 303, p. 357.]

IC 18-4-3-4

There shall be a deputy mayor, and such additional deputy mayors as shall be authorized by ordinance of the city-county council. Deputy mayors and directors shall be appointed by the mayor. Any proposed appointment to such office or position shall be submitted to the city-county

council at a meeting thereof and shall become effective if approved by a majority of the members of the city-county council. Each administrator shall be appointed by the director under whom he serves with the approval of the mayor unless otherwise provided in this article [chs. 91-95 of this title]. Directors, deputy mayors and administrators shall, except as otherwise provided in this article, be appointed for terms of one [1] year to serve at the pleasure of the mayor. In the event of the incapacity of, or a vacancy in the position of the director of the department of public safety, the mayor may appoint an acting director of such department and he shall have all of the powers and authority of a director under this article. [Acts 1969, ch. 173, § 304, p. 357; 1971, P. L. 258, § 3, p. 989.]

IC 18-4-3-5

The clerk shall be elected by the city-county council for a term of one [1] year to serve at its pleasure and shall be responsible to the council, acting as its secretary, sending out all notices of its meetings, keeping all its records, and performing such other duties in connection with the work of the council as shall be delegated to him by the council. [Acts 1969, ch. 173, § 305, p. 357.]

IC 18-4-3-6

The city-county council shall consist of twenty-nine [29] members elected for four [4] year terms in accordance with the general election laws relating to the election of city officials, the first election to be held at the time of the primary and general election in which a mayor of the consolidated city is to be elected under this article, the term of the council members to commence on January 1 following each such general election.

Four [4] of the members of the council shall be elected from an electoral district which shall consist of the entire county and shall be elected by all voters of the county voting for such office. Each such member may reside any place within such district and shall have been a resident thereof for two [2] years prior to the time he is to take office. Each of the remaining twenty-five [25] members shall be elected from a single additional electoral district by the voters voting for such office in such district, shall be a resident of such district and shall have been such resident for two [2] years prior to the time he is to take office. To this end, the county and the consolidated city shall be divided into twenty-five [25] council districts. The terms of office of all members of the common council of the first class city and of the county council of the county when they become members of the interim city-county council, shall extend to, and shall terminate upon January 1, following the first general election held pursuant to this article.

A member of the city-county council shall be a resident voter of the consolidated city at the time of such election. [Acts 1969, ch. 173, § 306, p. 357; 1973, P. L. 175, § 2, p. 874.]

IC 18-4-3-7

In the event any member of the city-county council shall die, resign, remove his residence from the electoral district from which he was elected, be incapacitated for a period in excess of six [6] months or be removed from office, his membership on the city-county council shall become vacant. A vacancy in the office of any member shall be filled for the unexpired term by appointment by a majority of the remaining members of the city-county council of

any person meeting the qualifications for his office set out in section 306 [§ 48-9206]. A special meeting of the city-county council shall be called within ten [10] days of such vacancy, in the same manner as is provided in section 303 [§ 48-9203], for the purpose of filling such vacancy. [Acts 1969, ch. 173, § 307, p. 357.]

IC 18-4-3-8

The twenty-five [25] single member council electoral districts provided in section 306 [§ 48-9206] shall have the following characteristics:

(1) Be as equal as practicable in population.

(2) Be compact in configuration, subject only to natural boundary lines, such as railroads, interstate highways, other major highways, rivers, creeks, parks and major industrial complexes and to the requirement, where practicable, of being located entirely outside or entirely inside a special service district.

The electoral districts from which council members are elected shall be determined by ordinance of the city-county council. The first such determination shall be made by November 30 of the year preceding the first general election pursuant to this act [chs. 91-95 of this title]; the next by June 30 of the year preceding the succeeding election pursuant to this act, and subsequent determinations prior to June 30 each eight [8] years thereafter for the next elections succeeding each such June 30 dates. [Acts 1969, ch. 173, § 308, p. 357.]

IC 18-4-3-9

Upon the council's failure to make the electoral district determination in the time provided, or in the event the

manner in which electoral districts have been established is alleged to be in conflict with the above provisions, or is otherwise invalid, any registered voter of the county or of the consolidated city or any taxpayer therein may take an appeal from the inaction or action of the council to the superior court of the county sitting en banc, or if there is no such court which sits en banc therein to the circuit court of the county, with the right of such court to draw proper district boundaries if they are found to be in violation of the provisions of this act [chs. 91-95 of this title] or otherwise invalid, to appoint a master to assist in its determination, with no change of venue from the county or the court, with appeals from any action of the court to be taken in the same manner as appeals from any other actions within thirty [30] days, such appeal to be taken directly to the Supreme Court.

Each election shall be held pursuant to the ordinance or court judgment determining districts, in effect at the time of such election, whether or not such ordinance or judgment is later determined to be invalid. [Acts 1969, ch. 173, § 309, p. 357.]

IC 18-4-3-11

The city-county council shall set up standing committees of not less than three [3] council members for each department, with full power to investigate the policies and expenditures of the department, with subpoena powers to require attendance before the committees, of employees of the consolidated city, any department thereof or any special taxing district or special service district, and with the right to examine any record or account of the city department or district. The council shall also have the power to establish such other committees with such powers as

it shall determine by ordinance. The council may hire an internal auditor to examine the books and records of the consolidated city and such districts and the county and may also cause such books to be examined by an independent certified public accountant. [Acts 1969, ch. 173, § 311, p. 357.]

IC 18-4-3-12

The departments provided in Articles IX, X, XII and XIII [§§ 48-9346—48-9481] shall be administered in accordance with the provisions of those articles and shall include boards called respectively the board of public works, the board of transportation, the board of public safety and the board of parks and recreation. The persons serving on such boards shall be styled "members." Each such board shall consist of the director of the department who shall serve as its presiding officer, two [2] members appointed by the mayor and two [2] members appointed by the city-county council, such appointments being made for terms of one [1] year, the members to serve, however, at the pleasure of the appointing officer or body. [Acts 1969, ch. 173, § 312, p. 357.]

IC 18-4-3-13

Except as otherwise provided in this Article, IC 1971, 18-4 [chs. 12, 14, 21, 24, 28, 70, 86, 90-96 of this title and §§ 53-1501—53-1524], each special service district of the consolidated city shall provide service solely within such district. Such special service district shall have no authority to issue bonds. [Acts 1969, ch. 173, § 313, p. 357; 1972, P. L. 134, § 1, p. 629.]

IC 18-4-3-14

At the time all or substantially all of the power and duties of any agency, board or commission of a first class

city are transferred under the terms of this act [chs. 91-95 of this title] to any departments, special taxing districts or special service districts of the consolidated city, such agency, board or commission of the first class city shall be abolished.

At the time the power and duties to perform any function is transferred from any agency, board or commission of the first class city, the county or any body corporate to the consolidated city, or any department, special taxing district or special service district thereof, the property, records, personnel, contracts and all other rights and liabilities thereof related to such function, including all rights and obligations arising under any pension or retirement plan or fund, shall be similarly transferred except as follows: (1) the city-county council may by ordinance direct a different repository therefor; (2) general obligation bonds or other indebtedness of the first class city or indebtedness assumed by the first class city, other than bonds or indebtedness relating to the function of a special service district, shall be binding upon and obligations of the consolidated city; (3) bonds or indebtedness relating to any function transferred to a special service district shall be binding upon and obligations of the consolidated city; (4) bonds and indebtedness of any special taxing district shall be the obligation of the special taxing district which continues the function of the special taxing district on account of which such bonds and indebtedness were issued. Nothing in this act shall be construed to impair the obligation of any indebtedness or contract existing on the effective date [January 1, 1970] of this act.

All proceedings and petitions pending before any board, commission or other agency at the effective date the powers thereof are transferred under the terms of this act shall be transferred to the official, board, commission

or agency who would have the power to act upon such proceeding or petition under the terms of this act.

All other municipal corporations, boards, agencies and commissions created by applicable law, or by any ordinance until such ordinance is amended, shall not be affected by this act, except to the extent that such powers are transferred to the consolidated city or department thereof or are otherwise limited under this act. Without limiting the generality of the following enumeration, such municipal corporations, boards, agencies, authorities and commissions shall include: airport authority and board established pursuant to Acts 1961, c. 283 [§§ 14-1301—14-1336]; health and hospital corporation and board established pursuant to Acts 1951, c. 287 [§§ 35-902—35-950]; county department of welfare and board established pursuant to Acts 1936 (Spec. Sess.), c. 3 [§§ 52-1001, 52-1101—52-1130, 52-1201—52-1280m, 52-1301—52-1315, 52-1401—52-1417]; county home board established pursuant to Acts 1955, c. 119 [§§ 22-2801—22-2819]; building authority, board of trustees and board of directors established pursuant to Acts 1953, c. 54 [§§ 26-2501—26-2523]; capital improvements board of managers established pursuant to Acts 1965, c. 326 [§§ 26-2801—26-2821]; housing authority established pursuant to Acts 1937, c. 207 [§§ 48-8101—48-8127], except to the extent expressly limited or changed by Article VIII [§§ 48-9326—48-9339] of this act; library districts and boards thereof established pursuant to Acts 1947, c. 321 [§§ 41-901—41-921]; and any school corporation, all or a part of the territory of which is in the consolidated city or county. Where, however, after the effective date [January 1, 1970] of this act, the power to make an appointment to the governing body or any other board connected with such board, agency or commission, or the

power to take any action in connection with the operation of such board, agency or commission, is vested in the county council of the county or the common council of the first class city, such power shall be vested in the city-county council. [Acts 1969, ch. 173, § 314, p. 357.]

IC 18-4-3-15

At the expiration of the terms of the commissioners of the board of county commissioners of the county, or upon a vacancy in the office of any such commissioner, after the effective date [January 1, 1970] of this act, such commissioners shall consist of the county treasurer, county auditor and county assessor serving ex officio. Where such terms expire or vacancies occur at different dates, the ex officio commissioners shall take office in the order named. Such treasurer, auditor and assessor shall have, as additional duties of their respective offices, service as such commissioner and shall receive no compensation, remuneration or reimbursement for expense on account thereof. [Acts 1969, ch. 173, § 315, p. 357.]

IC 18-4-4-9

Except where otherwise provided in this act [chs. 91-95 of this title] and after the effective date [January 1, 1970] thereof, appointments shall be made under the following terms:

(1) Where an appointment is to be made to any board or commission by the mayor of a city of the first class in the county, the appointment shall be made by the mayor.

(2) Where an appointment is to be made by the common council of a city of the first class in the county or the county council in the county, such appointment shall be

made by the city-county council. [Acts 1969, ch. 173, § 409, p. 357.]

IC 18-4-5-7

Compensation of all employees shall be set pursuant to ordinance or resolution of the city-county council or in the case of a special service district by its council, which may be by salary schedules. No compensation limits shall be imposed except those set by such ordinances or resolutions. The city-county council shall also determine by ordinance the compensation of the mayor and the city-county council. The compensation of the mayor or any member of such council shall not be changed during the term of such officeholder, but shall apply to the persons serving as mayor or council members at the next succeeding term thereof, except that the salaries of the members of the county council of the county may be changed so that they equal the compensation of the members of the common council of the first class city. [Acts 1969, ch. 173, § 507, p. 357.]

ARTICLE IV.--DISTRIBUTION OF POWERS

IC 18-4-4-1

The mayor shall be the chief executive and administrative officer of the consolidated city, shall supervise the work of its departments, its special taxing districts and special service districts, and in connection therewith shall have, but not be limited to, the power to examine any records, make any investigation and require any reports from any personnel. [Acts 1969, ch. 173, § 401, p. 357.]

IC 18-4-4-2

The mayor shall, subject to the limitations set out in this act [chs. 91-95 of this title] and to the powers of any

director, administrator, board or commission provided hereunder, exercise all the powers of the consolidated city, however characterized, except as follows:

(1) Such officers and employees shall not make any appropriations required to be made by appropriation of a local governing body under applicable law or incur any bonded indebtedness not authorized or approved by the city-county council.

(2) The exercise of any power may be denied or regulated by any ordinance or resolution of the city-county council not in conflict with the provisions of this act and other applicable law.

(3) Only the city-county council shall have the right to adopt regulatory ordinances of the consolidated city carrying a penalty.

No executive or administrative function of the consolidated city shall be performed by the council. [Acts 1969, ch. 173, § 402, p. 357.]

IC 18-4-4-3

A deputy mayor shall have such powers of the mayor, and only such powers, as are specifically and explicitly delegated by the mayor pursuant to ordinance adopted by the city-county council. [Acts 1969, ch. 173, § 403, p. 357.]

IC 18-4-4-4

The city-county council, subject to the limitations set out in this article [chs. 91-95 of this title] and the power of any board or commission provided hereunder, shall be the primary legislative body of the consolidated city, shall have exclusive power to adopt budgets, to levy taxes or

special taxes and to make appropriations required to be made for the consolidated city, any of its departments and its special taxing districts by a local governing body, excepting the appropriation of the proceeds of the bonds of any special taxing district where the city-county council approves the bond issue, and shall have the power to adopt any resolution or ordinance relating to the exercise of its powers.

The city-county council shall also be the primary legislative body of the county, shall have exclusive power to adopt budgets and make appropriations required to be made for a county and shall have the power to adopt any resolution or ordinance exercising such powers. From and after the effective date [January 1, 1970] of this article, all power and authority vested in the board of county commissioners of the county under any law of this state to adopt any ordinance, or any regulatory rule or regulation imposing a penalty, shall be transferred to and be vested exclusively in the city-county council.

From and after January 1 of the calendar year this article becomes effective with respect to any consolidated city, any action authorized or required to be taken by a "common council" of a city of the first class or by a "county council" under any statute or law of this state shall be deemed performed when done or taken by the city-county council. [Acts 1969, ch. 173, § 404, p. 357; 1971, P. L. 258, § 4, p. 989.]

IC 18-4-4-4.5

The directors of the departments provided for in 18-4-6-1 [§ 48-9301] of this code shall prepare and submit to the controller on or before the first Tuesday after the first Monday in July, an estimate of the amount of money

required for their respective departments for the ensuing fiscal year, stating with as great particularity as possible each item thereof and separated into major budget classifications and detail accounts. The controller shall at the same time prepare an itemized statement or estimate of city expenditures for other purposes, for the ensuing year, over and above the money proposed to be used by the various departments. The controller shall proceed to revise such estimates for the ensuing year, and shall then advise the mayor of the various estimated amounts required, for each department, and for other city expenses, together with an estimate of the necessary per cent of taxes to be levied with such recommendations as he may see fit. The mayor shall decide upon the final figures to be included in the proposed budget ordinance and advise the controller of those figures.

Every county officer and county agency shall prepare an estimate, itemized with as great particularity as possible and separated into major budget classifications and detail accounts, of the amount of money required for his office or agency for the ensuing calendar year. The clerk of the circuit and superior courts shall prepare a separate similarly itemized estimate of the amount required for such year for each court of which he is clerk. To each of such estimates, there shall be appended a certificate, verified by the oath of the officer preparing the same, to the effect that in his opinion the amount fixed in each item will be required for the purpose indicated thereby. The estimate of the amount of money required for any court or division thereof shall be subject to modification and approval by the judge of such court or division thereof. In addition to the above estimates, the clerk of the circuit court shall prepare an estimate of the amount required

for expenses of insanity inquisitions during the ensuing calendar year and the amount required to pay expenses of cases tried in other counties on changes of venue, such as are taxable under the law against the county from which the change is taken. All of the estimates shall be presented to said auditor on or before the first Tuesday after the first Monday in July.

It shall be the duty of the controller and the auditor, with the assistance of the legal division, to prepare a proposed budget ordinance for the city and county which shall contain all of the amounts deemed necessary for the operation of every facet of consolidated government, listed in major classifications. The controller and auditor shall also prepare an ordinance fixing the proposed rate of taxation for the taxes to be collected in the ensuing year for all city and county offices, departments and agencies. Such proposed ordinances shall be submitted by the controller and auditor to the clerk of the city-county council, together with appropriation detail accounts for each city department, division and county office and agency, on or before the third Monday in July.

It shall be the duty of such council to accept the ordinances and detail accounts, to hold public hearings thereon after publication of notice to taxpayers, pursuant to IC 1971, 6-1-1-24 [§ 64-1914], and to act upon such ordinances by adopting the same or amended or substituted ordinances which fix the tax rates and make the appropriations for the ensuing year.

Notwithstanding any other provisions of this code purporting to fix a time for the adoption of city or county budget or tax levy ordinances, such action shall be taken and ordinances adopted at a public meeting of the city-county council not later than the second Monday in September.

The county tax adjustment board shall hold its first meeting on the Wednesday immediately after the adoption of such ordinances.

If at any time after the passage of the budget ordinance should a necessity arise for further appropriations during the budget year, such appropriations may be made by the city-county council on the recommendation of the controller as to city departments, and on the recommendation of the auditor as to county offices and agencies. Notwithstanding the provisions of any other act, if the city-county council shall determine that it is necessary to transfer money from one major classification to another within a given department, division or county office or agency, and such transfer does not necessitate expenditure of more money than was set out in detail in the published budget, the transfer may be made by adoption of an ordinance at any public meeting of the council. Such transfers of funds may be made without prior published notice and shall not be subject to approval by the state board of tax commissioners. The clerk of the council shall certify all such transfer ordinances to the county auditor who shall in turn forward copies of the same to the state board of tax commissioners for their information: Provided, always, That any action under the provisions of this article [chs. 91-95 of this title] shall not in anywise be undertaken or done if the effect thereof shall increase, or tend to increase, the aggregate levy for taxes as theretofore made.

The city-county council shall have the right to review and modify the operating and maintenance budget and the tax levies, of any airport district and board in the county established pursuant to IC 1971, 19-6-2 [§§ 14-1301—14-1336], of any library district and board in the county

established pursuant to IC 1971, 20-13-1 [§§ 41-901—41-921], and any health and hospital corporation and board in the county established pursuant to IC 1971, 16-12-21 [§§ 35-902—35-950]. Such boards shall, after adoption of their respective budget ordinances and tax levies, submit the same, together with detail accounts, to the clerk of the city-county council on or before the first Tuesday after the last Monday in August. [IC 1971, 18-4-4-4.5, as added by Acts 1971, P. L. 258, § 5, p. 989.]

IC 18-4-4-5

The special service district council of any special service district shall, with respect to such district have exclusive power by ordinance to approve its budget and make appropriations and tax levies required to be made under the provisions of this article [chs. 91-95 of this title]. No special service district council shall have authority to originate or separately to adopt any other ordinance. However any ordinance adopted by the city-county council relating solely or exclusively to a special service district shall be suspended and of no effect until separately approved and concurred in by a majority of a special service district council when, but only when, the Constitution of the United States or the Constitution of the state of Indiana prohibits such ordinance taking effect without such approval. [Acts 1969, ch. 173, § 405, p. 357; 1971, P. L. 258, § 6, p. 989.]

IC 18-4-4-6

The powers of all included towns and any conservancy district located in whole or in part within the boundaries of the consolidated city, including, but not limited to their respective powers with respect to streets, roads, sidewalks

and sewers, shall be unchanged by this act [chs. 91-95 of this title], except that no such town or district shall have the right to issue general obligation bonds or enforce a regulation or ordinance within the county which is in conflict with or permits a lesser standard than any ordinance of the consolidated city which is also applicable. [Acts 1969, ch. 173, § 406, p. 357.]

IC 18-4-4-7

From and after the effective date [February 25, 1972] of this chapter, all powers, rights, titles, interests and authority vested in the board of county commissioners under any law of this state shall be transferred to and be vested exclusively in the mayor of the consolidated city, with only the following exceptions, to-wit: (1) powers and authorities formerly placed in the board of county commissioners, by statute, which heretofore have been transferred to the city-council; (2) powers conferred by the Indiana Constitution Article 9, Section 3, on county boards and heretofore assumed by the board of county commissioners; and (3) all powers, duties, and responsibilities pertaining to the issuance and payment of bonds of the county and control of the expenditure of the unexpended proceeds of such bonds. Nothing in this section shall affect the statutory power of the board of county commisisoners to appoint other officers or members of boards, commissions or other bodies. The board of county commissioners shall have only such power which it now has under applicable law, as are not transferred to or vested by law in the consolidated city, its districts, the city-county council, the mayor or a department, director or administrator of the consolidated city. [Acts 1969, ch. 173, § 407. p. 357; 1972, P. L. 134, § 2, p. 629.]

ARTICLE XI.—PUBLIC HEALTH

IC 18-4-11-1

The consolidated city, through representatives designated by the mayor and the city-county council, shall meet periodically with the board of trustees of a health and hospital corporation created under Acts 1951, c. 287 [§§ 35-902—35-950], and actively pursue efforts to make and carry out mutually agreeable contracts between such corporate bodies, to the end that services authorized by such act may be rendered more efficiently and duplication and overlapping activities eliminated. [Acts 1969, ch. 173, § 1101, p. 357.]

ARTICLE V.—GENERAL PROCEDURES

IC 18-4-5-1

Meetings of the city-county council, the board provided by section 312 [§ 48-9211], and the council of any special service district (all referred to in this section as the "board") shall be held in accordance with the following provisions:

(a) Regular Meetings. Regular meetings shall be held by each board, except the council of any special service district, not less often than once each month at times and places established by resolution of the board or incorporated in its rules. No notice need be given any board member for holding or taking any action at a regular meeting.

(b) Statutory Meetings. Where a meeting is held pursuant to a procedure set up by law and where publication of notice of the meeting is required, no notice of the meeting is required or need be given any board member for holding or taking any action at such meeting contemplated

by such notice; and the meeting shall be held at the time and place specified in such published notice.

(c) Special Meetings. Special meetings of a board shall be held on call of its chairman, president or presiding officer, or by 40% of its members. Such call shall be evidenced by a written notice specifying the time and place of the meeting, delivered to each member personally or sent by mail or telegram so that each member has at least seventy-two [72] hours' notice thereof.

(d) Meetings Open to the Public. All meetings of a board shall be open to the public to the extent required by, and the board shall comply with, Acts 1953, c. 115 [§§ 57-601—57-606].

(e) Waiver of Notice. Where notice of a meeting is required and each board member has waived notice thereof, as provided below, no such notice shall be necessary. Waiver of notice of any meeting by any board member shall consist of the following:

(1) His presence at the meeting; or

(2) His execution of a written waiver of notice of the time and place of the meeting, executed either before or after the meeting. Where, however, such waiver is executed after the meeting, such waiver shall also state in general terms the purpose of the meeting. Where a waiver recites that it was executed before the meeting, third persons shall be entitle to rely on such statement.

(f) Quorum. At a meeting of a board, a majority of the members shall constitute a quorum. No action may be taken unless a quorum is present. Except where a larger vote is required by applicable law with respect to any matter, all ordinances and resolutions shall be adopted solely by a majority of the members.

(g) Place of Meeting. All meetings of a board for the conduct of business shall be held at the regular meeting place or places within the county provided by the resolution or rule setting up the times and places of the regular meeting, except as follows:

(1) Special meetings may be held at any place within the county designated in the call thereof.

(2) Statutory meetings may be held within or without the county in accordance with applicable law, as may occur where the meeting is held jointly with the governing body of another board, agency, commission or governing body of another municipal corporation.

(h) The council shall meet at its regular meeting in January of each year to elect a president and such other officers as it shall see fit. [Acts 1969, ch. 173, § 501, p. 357.]

IC 18-4-5-2

The city-county council and any special service district council (both referred to herein as the "council") may take official action by the adoption of ordinances or resolutions in accordance with the following provisions:

(a) An ordinance of the council shall not be passed on the same day or at the same meeting it is introduced, except in the following instances: (1) where the ordinance is adopted by unanimous consent of the council members present at any meeting and where at least two-thirds [⅔] of the members of the council are present and voting; or (2) where such an ordinance is initiated by a director, board or commission and does not provide for an appropriation or tax levy or the incurring of any general obligation indebtedness; or (3) where such an ordinance is for a re-

appropriation or transfer of funds previously appropriated by the annual budget ordinance.

(b) No hearing shall be necessary by the city-county council prior to the adoption of any ordinance, except as to ordinances providing for the annual budget or tax levy, ordinances for appropriations of previously unappropriated funds or ordinances providing for any general obligation indebtedness. In any instance, when the council is required by other statute to have a public hearing prior to the adoption of any ordinance or resolution, such hearing requirement shall be satisfied when held by any committee of the council. Any two [2] or more ordinances or resolutions may be jointly adopted by the same vote. No ordinance or resolution shall take effect unless adopted by the council.

(c) All ordinances or resolutions of the council shall be subject to the veto power of the mayor as provided herein, except any ordinance or resolution, or portion thereof, providing for the budget, or appropriating funds, for any constitutional office or officer of the county or any judicial office or officer or approving or modifying the budget of any independent corporation as to whom the city-county council serves as a review body respecting budgets pursuant to this article [chs. 91-95 of this title]; and except also the adoption of a resolution setting out rules for the internal management of the council, any resolution making an appointment provided to be made by the council under applicable law, or selecting the clerk, officers, employees, auditor or independent auditors of the council.

(d) Every ordinance or resolution of the council subject to the veto of the mayor, shall, upon its passage by the council, be signed by the presiding officer of the council, and presented to the mayor by the clerk. The clerk shall

note the time of such passage and presentment on the copy of such ordinance or resolution presented to the mayor. The mayor shall either approve such ordinance or resolution, as evidenced by his signature thereon, or shall veto such ordinance by returning it to the clerk with his objections in writing within ten [10] days after receiving it, and the clerk shall present it to the council at its next meeting. If the mayor fails to approve or thus veto such ordinance or resolution within such period, such failure shall be deemed a veto. Any ordinance or resolution vetoed by the mayor, including but not limited to an item veto in an appropriation or budget ordinance, shall not become effective unless, at the next regular or special meeting after the mayor's veto, the council shall again pass the same ordinance or resolution, or budget or appropriation item, by a two-thirds [⅔] vote of all its members.

(e) Where any resolution or ordinance contains a budget or appropriation of money, the mayor may, except as limited in paragraph (d) above, veto any item in the budget or appropriation, stating his objections in writing within such ten [10] days and approve the remainder of the ordinance or resolution not thus vetoed. The clerk shall present any item or items thus vetoed to the council at the same time and in the same manner and the item shall be deemed adopted solely in accordance with the procedure set out in paragraph (d) above.

(f) No ordinance or resolution of the council imposing a penalty or forfeiture for the violation thereof shall take effect until it is published once each week for two [2] consecutive weeks in a newspaper of general circulation in the county, except in the case of insurrection, riot, pestilence, conflagration or other case of urgent necessity requiring the immediate operation of such ordinance. In the

latter cases, it shall take effect as soon as proclamation is made by the mayor and copies of the ordinance or resolution are posted in three [3] public places in the county. Whenever the council shall publish any of its ordinances in book or pamphlet form, such publication shall be of itself sufficient, and such ordinances shall be in force in two [2] weeks from the date off the publication of such book or pamphlet. Subject to the above provisions, each ordinance or resolution shall take effect at the time it is adopted unless it is required to be signed by the mayor. In the latter case, it shall take effect when it is thus signed or the mayor's veto is overruled. Any ordinance or resolution may take effect at a later time if it so provides.

(g) All ordinances adopting or amending zoning ordinances or regulations pursuant to IC 1971, 18-7-2 [§§ 53-901—53-985], or otherwise authorized by said law, shall be adopted and acted upon by the city-county council, and shall take effect, in accordance with the procedures of said law and paragraph (b) above and shall not be subject to the provisions of 18-5-4-2(a), (c), (d), (e) or (f) [subsections (a), (c), (d), (e) or (f) of this section].

(h) Record Authentication of Ordinances. All resolutions or ordinances shall, within a reasonable time after the approval of the mayor or their passage over his veto, be recorded in a book kept for such purpose by the clerk. Such record shall include the signature of the presiding officer, the attestation of the clerk, the mayor's written approval or disapproval and in the latter case, a memorandum of the passage of the ordinance over his veto with the date of each such act. Such record or certified copy thereof, or the publication of any ordinances of the council in book or pamphlet form if the same is purported to be printed under the authority of the council, shall be pre-

sumptive evidence in all courts and places of the ordinances contained in such record certified copy or pamphlet and of the date of passage and the going into effect of all such ordinances and resolutions. [Acts 1969, ch. 173, § 502, p. 357; 1971, P. L. 258, § 7, p. 989.]

IC 18-4-5-5

Any power of the consolidated city provided in this act [chs. 91-95 of this title] shall be exercised in the manner provided in this act despite the provisions of any other law. Where no method is provided for the exercise of a power or to the extent the method prescribed is incomplete, it may be established by ordinance of the city-county council, subject to the following provisions:

(a) Procedures for borrowing money, appropriating money, levying and collecting taxes, making purchases and entering into contracts shall be subject to the applicable laws relating to municipal corporations generally.

(b) The issuance of special district taxing bonds and indebtedness shall be exercised in accordance with the method prescribed in any applicable law.

(c) Where no such ordinance is adopted and a provision is established for the exercise of any power of an office, board, agency or commission which is transferred to any department, special taxing district, special service district, office, board, agency or commission, by this act, it shall be exercised in the manner set up under any law for the exercise of the power thus transferred, subject to any modifications thereof made by this act and to the requirements of the constitution of the state of Indiana. [Acts 1969, ch. 173, § 505, p. 357.]

IC 18-4-5-9

At the time the power of any board, agency or commission, with respect to any function, is transferred to the consolidated city, or its special taxing districts or special service districts, the existing ordinances of such board, agency or commission shall become ordinances of and shall be solely enforceable by the consolidated city until amended as provided herein, only within the respective territorial areas to which they were applicable immediately preceding the effective date [January 1, 1970] of this act. Such existing ordinances shall include, without limiting the generality thereof, ordinances of the county council, common council of the first class city, the board of the mass transportation authority of the county, and the board of county commissioners of the county. [Acts 1969, ch. 173, § 509, p. 357.]

IC 18-4-5-6

(a) For the purpose of this section,

1. The term "board" shall refer to the board of the particular department of the consolidated city which has the power to award contracts, for which public notice is required, with respect to property of the consolidated city, and shall also include the board of directors of any public or quasi-public corporation.

2. The term "quasi-public corporation" shall include any not-for-profit corporation organized under the laws of this state pursuant to such procedure and for such purposes and functions as may be prescribed by law or by ordinance of the city-county council, which corporation is authorized to receive, hold and convey real or personal property and the board of directors of which corporation

consists of designated public officials, or other persons, at least a majority of whom are appointed or approved by the city-county council, the mayor, any elected official or officials of the county, or any combination thereof.

3. The term "governmental agency" shall include the county, the consolidated city, and any department thereof, any township, city, incorporated town, school corporation or any other political, municipal, public or quasi-public corporation or any department, board, commission, agency or officer thereof, the territorial jurisdiction of which shall include all or any part of the county.

4. The term "governing body" with reference to any governmental agency is herein defined shall be the city-county council in the case of the county, the advisory board of a township, the city council of any city other than the consolidated city, the board of trustees of an incorporated town, the board of any department of the consolidated city as herein defined, or the board of directors or governing board of any public or quasi-public corporation, school corporation, municipal or political corporation, or any commission or other governmental agency having a governing board.

(b) Whenever the board determines that any real or personal property is no longer needed for purposes of the consolidated city, or the public or quasi-public corporation, or should in the public interests be exchanged for other property, it may, subject to the approval of the mayor, sell, exchange, lease, transfer or convey such property in accordance with the provisions of this section.

(c) The board may sell or transfer any property under its jurisdiction in accordance with the following provisions:

(1) Prior to the sale of any such property, the board shall cause it to be appraised by two [2] persons who shall make a joint appraisal. Such persons shall be professionally engaged in making such appraisals or shall be determined by the board to be persons familiar with the values of such property.

(2) After such property is appraised, the board shall cause a notice of the sale thereof to be published two [2] times in accordance with the law relating to publication of notices setting forth the terms and conditions of such sale. In such notice the board shall set out the terms of sale. Where the board determines that the best sale of the property can be made by letting the bidders determine certain of the conditions of sale, as, for example, required zoning, or soil or drainage conditions as a prerequisite to purchasing the property, the board may permit the bidders to specify such conditions. The notice shall state that bids will be received commencing on a date specified in the notice and that the sale shall continue from day to day thereafter for a period not in excess of sixty [60] days until the property shall be sold.

(3) All bids shall be made available for examination by the public. Any bidder may raise his bid effective after the board has given notice by mail to the other bidders. The board may also conduct an auction if it deems this appropriate, either at the time for commencing the sale in accordance with the public notice, or after the commencement of the sale where the public notice does not provide for an auction, without additional public notice, after giving each of the bidders, who has submitted a bid, written notice by mail of the time and place of the auction. The board may at any time before expiration of the time set out in the notice sell the property to the highest and

best bidder. It shall not, however, sell such property for less than 90% of the appraised value, without a further reappraisal. A sale after such reappraisal shall be made without reference to the appraised or reappraised value. The board shall have the power to reject all bids. Where the appraisal or reappraisal shows any property to be worthless, it may be demolished or junked without other procedure. The board of any public or quasi-public corporation may delegate its duties hereunder with respect to receipt and acceptance or rejection of or the conduct of an auction, to its duly appointed executive committee or to a committee of not less than three [3] of its officers appointed for such purpose.

(4) If the board determines at any time that in the exercise of good business judgment it should hire a broker of [or] auctioneer to sell the property, it may hire such broker or auctioneer, paying reasonable compensation therefor out of the proceeds of the sale without appropriation; this provision shall not, however, obviate the procedural requirements set out above, and in no case shall such broker or auctioneer be one of the appraisers.

(5) The board may sell, transfer or convey any such property, upon such terms as it shall determine and with or without consideration, to any other governmental agency, the territorial jurisdiction of which is coterminous with that of the governmental agency having authority to sell or convey the property pursuant to this section. For purposes of this section the territorial jurisdiction of the consolidated city and any department or agency thereof shall be deemed coterminous with the territorial jurisdiction of the county and of any governmental agency whose territorial jurisdiction extends to the entire county.

(6) The board may sell any such property to a governmental agency whose territorial jurisdiction is not cotermi-

nous with that of the governmental agency having authority to sell or convey the property pursuant to this section, upon such terms and conditions as may be agreed upon between the respective governing bodies of the governmental agencies, as evidenced by adoption of a substantially indentical resolution by each such governing body, without publication of notices of such sale or the receipt of bids as provided in this subsection; Provided, That such sale shall be made for a consideration equal to not less than the fair market value of the property as determined by the joint appraisal.

(d) The board may exchange any property under its jurisdiction for other property in accordance with the following provisions:

(1) In the event any such exchange is to be made with a nongovernmental body or any private person, firm or corporation, the exchange shall be made only after advertisement following as nearly as practical the procedure set out in subsection (c) of this section, with the property under its jurisdiction to be conveyed in part or full payment for the property it receives.

(2) Where the territorial jurisdiciton of any governmental agency covered by this section is coterminous with the territorial jurisdiction of any other governmental agency, within the meaning of subsection (c) of this section, an exchange of properties between them may be with or without consideration by the adoption of a substantially identical resolution by the board and by the governing body of the governmental agency with which the exchange is to be made.

(3) Where an exchange of properties is to be made by a governmental agency covered by this section with

any other governmental agency where the territorial jurisdiction of such governmental agencies is not coterminous as herein defined, the two [2] parties to the exchange shall each appoint an appraiser qualified as in the same manner provided in subsection (c) of this section each of which appraisers shall make a separate appraisal. The fair market value of such properties to be exchanged shall be deemed to be the average appraised value of the properties as determined by such separate appraisals. The party to the exchange with the lower average appraised value of its property shall pay in money to the party with the higher appraised value of its property the difference between the average appraisals for the two [2] properties, or shall have option to reject such exchange.

(e) In lieu of the sale of any such property the board shall be authorized to lease such property for such term or terms, with or without option to renew, and upon such conditions as the board shall determine, if in the judgment of the board the lease rather than sale of the property would be in the best interests of the governmental agency and of the public. The procedure for the lease of any such property shall be the same as provided in subsection (c) of this section with respect to the sale of property, except that the appraisers shall determine the fair rental value of the property in addition to its fair market value for sale purposes. In the case of the lease of property to a nongovernmental agency or private person, firm or corporation, bids shall be received as provided in subsection (c) and the board shall not lease the property for less than 90% of the appraised fair rental value without a further reappraisal. A lease after such reappraisal shall be made without reference to the appraisal or reappraisal value. The property may be leased to a governmental agency

for an amount not less than the fair rental value as so determined, provided that the property may be leased to a governmental agency the territorial jurisdiction of which is coterminous with that of the lessor within the meaning of subsection (c) of this section upon such terms as the board shall determine, and with or without consideration. The board may also lease such property with option to purchase. The terms of a lease with option to purchase may provide that the purchaser may apply, all or a portion of the rental payments under the lease to the purchase price, provided that the purchase price shall be increased by an amount not less than six per cent [6%] per annum for any period of time between the date of commencement of the lease term and the date of final payment of the purchase price upon exercise of the option to purchase. The purchase price (exclusive of percentage increase for instalment payment therefor) under any such lease with option to purchase shall be not less than the minimum sale price of the property determined under subsection (c) of this section.

(f) Where new property is purchased by the consolidated city or its special taxing district[s] or special service districts, in accordance with applicable law and one of the conditions of the purchase is that property of a similar nature of the consolidated city, or its special taxing districts or special service districts, is to be traded in or exchanged as part of such purchase and in reduction of the price thereof, such trade-in or exchange shall be legal without following the provisions of subsection (d) of this section.

(g) In carrying out the provisions of this section, a simple majority of the board, or in the case of a public or quasi-public corporation, any two [2] or more of its

officers duly authorized by resolution of its board, shall be entitled on behalf of the governmental agency covered by this section to execute warranty deeds, quit-claim deeds, bills of sale, leases, and any other documents reasonably necessary to affect [effect] the transaction contemplated thereby. All deeds, bills of sale and leases of city property executed by any board shall be approved by the mayor and bear his signature.

(h) Where a dispute exists concerning the interests in any property of any governmental agency authorized by this section to sell or convey property and such dispute is not frivolous in the opinion of the corporation counsel, or where it would facilitate the establishment of title to any property, such deed or other document of title may be executed as provided above on behalf of the governmental agency covered by this section for such consideration, if any, as the board deems fair and in the public interests.

(i) Any real or personal property owned by the county which is not required or satisfactory for use by the county, including without limitation property acquired by the county at public sale for the payment of delinquent taxes, may be sold, transferred, conveyed, traded or exchanged with the consolidated city or any department thereof, or with any public or quasi-public corporation the territorial jurisdiction of which is coterminous with the territorial jurisdiction of the county, as provided in subsection (c) of this section, upon such terms and conditions with or without consideration, as may be mutually agreed upon and incorporated in an agreement between the board of commissioners of the county and the board of the department of the consolidated city or of the public or quasi-public corporation, as the case may be. [Acts 1969, ch. 173, § 506, p. 357; 1971, P. L. 258, § 8, p. 989.]

ARTICLE VI.—THE DEPARTMENTS

IC 18-4-6-1

The departments of the consolidated city shall initially consist of the following:

1. Department of administration.
2. Department of metropolitan development.
3. Department of public works.
4. Department of transportation.
5. Department of public safety.
6. Department of parks and recreation.

[Acts 1969, ch. 173, § 601, p. 357.]

IC 18-4-6-2

The departments to the extent provided in this act [chs. 91-95 of this title] may be administratively organized by divisions. [Acts 1969, ch. 173, § 602, p. 357.]

IC 18-4-6-3

Each director shall be the chief administrative officer of the department under his jurisdiction and shall, subject to any limitations set out in this act [chs. 91-95 of this title], and to any rules promulgated by the mayor, approve the hiring and dismissal of all personnel of the department, delegate to such personnel specific authority to act on behalf of the department or its director and together with such personnel shall exercise the powers of the department for which he is director, subject however to all restrictions, limitations and powers granted to any board or commission within such department. [Acts 1969, ch. 173, § 603, p. 357.]

CONSOLIDATED SECOND-CLASS CITIES AND COUNTIES ACT

IC 18-4.5-5-9

The following municipal corporations, boards, agencies or commissions shall not be affected by this article [§§ 48-9701—48-9790: except as provided in sec. 6 [§ 48-9756] of this chapter and as provided in IC 1971, 18-4.5-6-15 [§ 48-9785].

(a) Airport authority and board established pursuant to IC 1971, 19-6-3 [§§ 14-1201—14-1235].

(b) County department of welfare and board established pursuant to IC 1971, 12-1-3 [§§ 52-1117—51-1125a].

(c) Building authority, board of trustees and board of directors established pursuant to IC 1971, 19-8-4 [§§ 26-2501—26-2523].

(d) Redevelopment authority, board of trustees and board of directors established pursuant to IC 1971, 18-7-7 [§§ 48-8541—48-8567].

(e) Library districts and board thereof of the second class city or county.

(f) School corporation and board established pursuant to IC 1971, 20-4-1 [§§ 28-3501—28-3526].

(g) Levee authority established pursuant to IC 1971, 19-4-12 [§§ 27-1001—27-1033].

(h) Waterworks department and board established pursuant to IC 1971, 19-3-25 [§§ 48-5402—48-5427] and 19-3-27 [§§ 48-5427a, 48-5427b].

(i) Housing authority established pursuant to IC 1971, 18-7-11 [§§ 48-8101—48-8124, 48-8127]. [IC 1971, 18-4.5-5-9, as added by Acts 1973, P. L. 177, § 2, p. 900.]

APPENDIX C

RELATED CASE

United States District Court

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MASON BRYANT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. IP 69-C-115
	)	
EDGAR D. WHITCOMB, et al.,	)	
	)	
Defendants.	)	

OPINION

February 3, 1970

This suit questions the validity of the Indiana statutes providing for municipal government in Indianapolis and Marion County, Indiana, on the basis that these statutes dilute the voting rights of a cognizable, racial minority in violation of the First, Fourteenth, and Fifteenth Amendments of the United States Constitution. Jurisdiction is founded upon 42 U.S.C. 1933.

Plaintiff Mason Bryant is a Negro residing within Marion County, Indiana, and is a resident and voter in the Center Township Ghetto Area found to exist within Marion County, Indiana, by the three-judge court in the case of *Chavis v. Whitcomb,* 305 F.Supp. 1364 (S.D. Ind. 1969). Much of the same evidence presented to the three-judge court in the *Chavis* action pertaining to that area has been presented in this cause and the findings therein with regard to the Center Township Ghetto Area and the

cognizable, racial minority within that area are found to exist in this suit. For the reasons stated in the *Chavis* case, those plaintiffs who are not residents of the Ghetto Area are non-suited in this cause.

The defendants in this action are the Governor of the State of Indiana, the Mayor of the City of Indianapolis, and the members of the majority party of the legislative bodies for local government in Indianapolis and Marion County, Indiana.

The statutes challenged are provisions of Chapter 143 of the Acts of the Indiana General Assembly for the year 1909, and Chapter 173 of the Acts of the Indiana General Assembly for the year 1969, as they relate to electoral districting. The challenge to the 1909 Act is made only to the extent that it might be revived by a judicial declaration that the 1969 Act is unconstitutional. In view of the opinion in this case, it will not be necessary to give consideration to the validity of the 1909 Act.

After a careful analysis of the Act and the federal constitutional questions presented, the Court finds that the Act does contain unconstitutional provisions. However, each of the defects noted can be cured by implementation or other means as pointed out later in this opinion.

The evidence submitted was voluminous and consisted of plaintiffs' Exhibits A to QQ, and defendants' Exhibits 1 through 24, and certain responses of defendants to requests to admit and to interrogatories of plaintiffs. The Court has also taken judicial notice of the United States census figures for the years 1950 and 1960, so far as pertinent, and of all acts of the Indiana General Assembly so far as relevant to Chapter 173 of the Acts of the Indiana General Assembly for the year 1969. Briefs and arguments of counsel have been complete and helpful.

Both the plaintiffs and the defendants relies heavily on the history of the development of local government in Indianapolis and Marion County to support their respective contentions.

Plaintiffs asserted that for over one hundred years the statutes pertaining to local government have been written and rewritten with the primary purpose of vesting near complete control with the then current majority, and with the necessary result of diluting the voting rights, and political power, of identifiable minority groups.[1] They alleged that Chapter 173 of the Acts of 1969, popularly

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[1] The original councilmanic district ordinance under the present Indiana Constitution was enacted in 1852, and provided that all city councils should be elected from fifteen single-member districts at annual elections. (Acts 1852, Vol. 1, p. 205.) Then, in 1855 a local election was conducted in Indianapolis under fear of rioting by foreign born Germans (Indianapolis Journal, April 25, 1855, p. 11) and the results of the election were lamented in the local press because "the Dutch bunch" elected three representatives to the fifteen single-member district council. (Indianapolis Journal, May 2, 1855, p. 3.) At the next session of the General Assembly a new statute was enacted providing for the organization of cities which permitted cities to be divided into as few as three councilmanic districts with two councilmen to be chosen from each district at biennial elections for staggered terms of four years, thus diminishing the probability of minority bloc influence. (Acts 1857, p. 44, Secs. 8 and 9.) By 1880 the foreign born constituted slightly more than twenty per cent of the population of Indianapolis (these and subsequent similar figures are from appropriate U. S. Census) and in 1881 the General Assembly enacted a city council statute applicable only to Indianapolis creating an additional councilmanic house of altermen to be elected from districts three times as large as those from which the regular councilmen were to be elected. (Acts 1881, p. 114.) By 1890 persons of Germanic descent included about 27 per cent of the City of Indianapolis, and the following year the General Assembly amended the Indianapolis city council statute eliminating the Board of Aldermen and adding six members to the Council itself to be elected at large. (Acts 1891, pp. 140, 141.) Then, in 1909 the Indianapolis or "First Class City" councilmanic statute was again amended to provide that all members of the council would be elected at large (Acts 1909, p. 341). The bill was introduced by a sponsor who stated that the intendment of the act was that "only the better class of men would be chosen" to serve. Indianapolis News, February 5, 1909, p. 2, col. 2.) Whatever trend can be discerned from these historical facts must be regarded as largely reversed by the single-member districting feature of the questioned statute. These facts do demonstrate, however, that the problem judicially noted in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), is neither new nor confined to the emerging Negro voting minority and it is one which will probably persist as long as communities continue to be divided into socio-economic and ethnic enclaves.

known as "Unigov," is simply the latest example of such legislative action by the dominant majority under the guise of municipal reform and metropolitan government. They contended that Unigov makes no major changes in local government other than to extend the voting district for the election of the executive and legislative branches of local government from the existing city limits to the county boundaries. This change confers voting rights on numerous individuals in the middle and upper class suburbs which are nearly all white.[2] The ultimate result, plaintiffs alleged, is to dilute substantially the possibility that the cog-

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[2] In addition to alleging the "Ghetto Area" found in *Chavis v. Whitcomb*, the plaintiffs also have alleged a slightly different ghetto area consisting of 1960 United States Census Tracts 220, 501-503, 508, 510-518, 520, 528-531, 534-536, and 540, and have contrasted its statistical profile with that of the outside-Indianapolis-inside Marion County area that is added to the Indianapolis voting district by the questioned statute.

	1.	2.	3.	4.
Robert Kennedy vote, 1968 Presidential Primary	62.43%	344.53%	69.70%	16.63%
Hubert Humphrey vote, 1968 Presidential Election	73.07%	173.28%	60 86%	25.63%
% of Population that is Negro	71.09%	467.64%	5.87%	1.86%
*% of Families below $4000 inc.	45.00%	296.44%	58.98%	18.37%
Portion of dilapidated houses in county	40.45%	256.01%	45.51%	14.43%
Portion of dwelling units built before 1939 in county	22.44%	142.02%	42.48%	13.46%
Portion of workers who use public transportation to go to and from work	29.12%	184.30%	36.57%	11.55%
Portion unemployed in county	28.74%	181.89%	47.85%	15.16%
**Portion of college graduates in county	1.51%	9.55%	122.19%	38.68%
Portion of statistical functional illiterates in county	31.47%	198.73%	51.26%	16.24%
*Median family income and proportion to county-wide median	$4,378	66.42%	125.56%	$7,661
**Median education and proportion to county-wide median	9.2 yr.	82.60%	107.02%	12.2 yr.

nizable, racial minority in the Center Township Ghetto Area would be able to pursue effectively political action to further their interests.

In essence, plaintiffs contend that the statute is simply a racial gerrymandering of local government boundaries within the meaning of *Gomillion v. Lightfoot,* 364 U.S. 339, 5 L.Ed.2d 110 (1960), and an unconstitutional dilution of voting powers as defined in *Allen v. State Board of Elections,* 393 U.S. 544 (1969).

The defendants, however, contend that Unigov is a completely valid, and necessary, legislative effort to reorganize local government to enable it to meet the ever-increasing demands being made upon it; and specifically to consolidate functions of the city and the county and numerous and fragmented elements of local government to create a viable unit for an expanding metropolitan area. Defendants point out that while the boundaries of the City of Indianapolis in the past may have roughly conformed to the urbanized area, they have not in recent years kept up with the expansion of the urbanized area. As a result, a gap has existed between the problems created by urbanization and the ability of government to cope with it in any coordinated and orderly fashion.

Column 1 gives the percentage or portion or median figure for the Ghetto Area or the Ghetto Voting Area or the Negro population in Indianapolis, as noted.

Column 2 shows the deviation of the Ghetto of Indianapolis Negro figure from the county-wide figure.

Column 3 gives the deviation of the Marion County Outside Indianapolis figure from the county-wide figure.

Column 4 gives the Marion County Outside Indianapolis percentage or portion figure as noted.

(All items except voting figures are based on the 1960 U. S. Census.)

*Figure is given for Negroes in Indianapois, not Ghetto.

**Four census tracts near predominately white institutions of higher education were abstracted from the Ghetto Area in arriving at the Column 1 figure.

Defendants have maintained that the statute does not discriminate against anyone, and in fact gives every resident an equal right to elect governmental officials. Defendants also have contended that the voting rights of no citizen have been curtailed, but on the contrary every citizen in the county has been given a more representative voice in the government as it affects him. They also point out that before enactment of Chapter 173 citizens living outside the City of Indianapolis were affected in certain functions by determinations of officials of the city who were not elected by them.

The United States Supreme Court has decided that the Fourteenth and Fifteenth Amendments, and the rights protected thereby, are applicable to state legislative actions which alter the boundaries of local units of government or which pertain to the electoral districting of local governmental officials.

Gomillion v. Lightfoot, 364 U.S. 339, 5 L.Ed.2d 110 (1960), involved the validity of an Alabama statute which made substantial alterations to the boundaries of the City of Tuskegee, Alabama. Petitioners alleged that the sole purpose of that act was to disenfranchise Negro citizens by changing the boundaries in such a manner that all but four or five of the four hundred Negro voters were placed outside the new city boundaries. The principal contention in support of the legislation was that the establishment of local units of government, and the boundaries thereof, was a proper and lawful purpose for a state legislature and not subject to judicial review. The opinion held that if the legislative act was designed to accomplish an unlawful purpose such as alleged by the petitioners, the statute was reviewable to protect the rights guaranteed by the Federal Constitution.

Avery v. Midland County, 390 U.S. 474, 20 L.Ed.2d 45, (1968), questioned the manner of selection of the Midland County, Texas, Commissioners Court. Midland County had a population of about 70,000. The Commissioners Court was composed of five members—one elected at large from the entire county and the other four from districts whose populations were approximately 67,906; 852; 414; and 828. The decision in that case held that such a vast imbalance violated the equal protection clause of the Fourteenth Amendment which was applicable to local units of government.

Justice White, in the majority opinion in *Avery v. Midland County, supra*, however, stated:

> "This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straightjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. Sailors v. Board of Education, 387 US 105, 18 L.Ed.2d 650, 87 S.Ct. 1549 (1967). The Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In Dusch v. Davis, 387 U.S. 112, 18 L.Ed.2d 656, 87 S.Ct. 1554 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population.
>
> "The Sailors and Dusch cases demonstrate that the Constitution and this Court are not roadblocks in the

path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called 'the emergence of a new ideology and structure of public bodies, equipped with new capacities and motivations . . .' R. Wood, 1400 Governments, at 175 (1961). Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population."

The Court notes, although it is not now in issue, that Chapter 173 requires the twenty-five single-member districts to be as nearly equal as practicable in population, and that plaintiffs have not contended that the *Avery* holding is applicable to the facts in this case.

Resolution of the issues presented in this case requires examination of the Indiana statute in the light of the above decisions, and under Article 42, Section 1983 of the United States Code and the First, Fourteenth, and Fifteenth Amendments. Significant provisions of the statute include:

1. Extension of the boundaries of the City of Indianapolis to the Marion County boundaries except for exclusion of three municipalities containing over five thousand inhabitants each.

2. Creation of a single executive-administrative branch for most local government activities within Marion County, with a Mayor elected by all voters in the county.

3. Creation of a single city-county council as the primary legislative body for both city and county government. Twenty-five councilmen will be elected from

single-member districts and four councilmen are to be elected by the county voters on an at-large basis.

4. Creation of six departments for the administration of local government. Most, but not all, of the numerous pre-existing governmental agencies and departments will have their functions and authority transferred into one or more of the new departments.

5. Creation of special service districts for certain governmental functions, principally police and fire. These districts will initially have boundaries coterminous with the old City of Indianapolis boundaries, will provide their governmental services only within such territory, and will levy taxes only within such territory. Provision is made in the Act for expansion of these special service districts as the need for and ability to render the services expands.

6. Creation of special service district councils with authority over budgets, appropriations and tax levies of the respective special service districts.

Plaintiffs have not alleged that the four councilmen-at-large feature of the questioned statute is unconstitutional per se but the firsthand impression similarity which this feature has to the matters considered in the related case of *Chavis v. Whitcomb* compels the Court to consider this possible issue.

The three most identifiable "black" voting wards in Marion County—the 3d, the 6th, and the 23d, returned 80.58% and 83.59% and 81.63% Democratic margins in the 1968 General Assembly election. In the 1964 presidential Election (which was the only election during the past decade in which the Democrat Party won the county-wide vote in Marion County) all of the wards outside Indi-

anapolis and Center Township returned a very heavy Republican vote while those portions of the former City of Indianapolis which lie inside the contiguous townships of Washington, Lawrence, and Warren and which contained a 1960 population of 141,896 returned a 59.5% Republican vote. The Indianapolis Metropolitan Planning Commission estimates Marion County's present population to be about 806,000. The said contiguous Republican areas inside the former City of Indianapolis would be entitled to four of the twenty-five single-member districts, and these seats together with the outside seats, would total thirteen or fourteen. Viewing the county voting pattern another way, it is to be noted that the pattern is apparently entrenched for the foreseeable future. In the 1968 General Assembly election the average margin between the two major parties in each ward was such that the typical "victory" of one party over another was a two-to-one "victory." It also can be noted that the pattern presently favors the Republican Party in any single districting plan because Democrat "ward victories" in that election were by an average margin of 39.5% of the total vote cast while Republican "ward victories" were by an average margin of only 27.8% of the vote cast. When the likely result of an election under "Unigov" is superimposed upon the only county-wide election in which the party which receives the regular bloc voting support of the Ghetto Area received its largest voting support in Marion County during this past decade, it becomes apparent that that party probably would have controlled the "Unigov" city-county council but only because of and not in spite of the four at-large city-county councilmanic seats. It also is apparent from the voting pattern in Marion County that it would be very improbable within the foreseeable future for the party which receives the bloc voting support of the Ghetto Area

to win thirteen or fourteen of twenty-five single-member seats without winning county-side. Plaintiffs conceded in the arguments before the Court that the four members-at-large feature of the questioned statute, presently and in the foreseeable future cannot but help the major party presently receiving the bloc voting support of the Ghetto Area and cannot but hurt the other major party from the standpoint of gaining majority control of the city-county council. Since the four members-at-large feature of the questioned statute cannot in fact dilute the vote of the Ghetto Area, it cannot be construed as having been designed to do so or as being contrary in any way to the dictates of *Fortson v. Dorsey*, 397 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401, 405 (1965).

Two constitutional issues are raised by plaintiffs with regard to the special service districts and their councils. One involves the composition of the councils, and the other the limited authority of these councils over the affairs of the special service districts.

Section 102 (m) of the 1969 Act provides:

> "(m) A 'special service district council' shall be comprised of the members of the city-county council elected from all those districts which encompass *any part* of a special service district." [Emphasis added.]

The initial question is whether the four at-large councilmen, elected by the voters of the entire county, would be members of the special service district councils, and whether the Act would permit districting so that councilmen with only a small part of their districts in a special service district would serve on such councils. The section of the statute quoted above is ambiguous on the at-large councilmen. The district for the at-large councilmen is the

county as a whole, which would encompass the *entire* special service districts. However, the statute specifies that only those councilmen whose districts encompass *"any part"* of a special service district shall be entitled to sit on the council. Construction of the statute to allow the at-large councilmen to sit on the special service district councils would raise serious constitutional issues since approximately forty percent of the voters for such councilmen will reside outside of the special service districts. It is well-established that, if at all possible, courts should construe legislation in such a manner that it meets constitutional standards and should not place a construction on a statute that would impute to a legislative body an intent to enact legislation contravening constitutional principles.

Accordingly, the statute is construed to exclude membership on the special service district councils of the four at-large councilmen. So constructed, it is constitutional in this aspect.

With regard to the districting aspect of the composition issue, Section 308 of the 1969 Act provides in part:

> "The twenty-five single member council electoral districts provided in section 306 shall have the following characteristics:
>
> "(1) Be as equal as practicable in population.
>
> "(2) Be compact in configuration, subject only to natural boundary lines, such as railroads, interstate highways, other major highways, rivers, creeks, parks and major industrial complexes and to the requirement, where practicable, of being located entirely outside or entirely inside a special service district."

The Court believes there should be no difficulty in drawing districts consistent with both the above mandate and

with the law stated hereinafter in the Court's determination that Unigov is unconstitutional in part. The Court, of course, does not have a specific apportionment plan before it to examine. If the plan drawn does not comply with constitutional standards, an appropriate judicial challenge can be made at that time.

However, the difficulty presented by the words *"any part"* which appear in Section 102(m) of the Unigov statute does not relate solely to a hypothetical future drawing of districts. The difficulty presented lies in the fact that once the districts are drawn, even a small enlargement of a special service district might have the effect of placing the entire city-county council on the special service district council. It is apparent from this that in order to meet the constitutional mandate in that portion of this opinion which follows immediately hereafter, provision will have to be made for limiting eligibility of special service district councilmen so that the composition of these councils will comply with the mandate of this opinion. This is a matter properly left to the state officials and courts.

The remaining issue on the special service district councils relates to Sec. 405 of the Act, which provides:

> "The special service district council of any special service district shall, with respect to such district have exclusive power by ordinance to approve its budget and make appropriations and tax levies required to be made under applicable law therefor; *and that shall be its sole function.*" [Emphasis added.]

Plaintiffs point out that this section apparently leaves the entire residue of legislative authority over important special service district functions, such as police, fire, redevelopment, and housing, with the combined city-county council. This twenty-nine member council, under present

population estimates, will include only fifteen or sixteen members elected from districts within the special service districts. Four of the councilmen will be elected from the county at large and nine or ten will be elected from districts completely outside the special service districts.

Plaintiffs contend that this constitutes a substantial dilution of the voting rights and political power of those within the special service districts, and in particular of the cognizable, racial minority found to exist in the Center Township Ghetto Area. A political party, or interest group, could conceivably command a majority of the twenty-nine member council with the at-large members, the nine or ten from districts outside the special service districts and by obtaining only one or two from within the district. Such a combination could overrule the vote of a substantial majority of the councilmen actually representing the voters and citizens of the special service districts, including those constituting the cognizable, racial minority.

The Court, accordingly finds that the statutory limitation as stated in Sec. 405 of the Act on the authority of the special service district councils over legislation relating solely to such districts, and which will be financed by taxes levied only within such districts, is unconstitutional as a substantial dilution of the voting rights of the citizens in the special service districts. Section 1503 of the Act provides:

> "If any provision of this act or the application thereof to any person or circumstances is invalid, such invalidity shall not affect the other provisions or applications of this act, which can be given effect without the invalid provision or application, and to this end, the provisions of this act are declared to be severable."

Severing the last clause of Section 405 would leave a comprehensive workable statute and eliminate the constitutional defect. The residue of legislative authority over special service district functions would then reside with the special service district council rather than with the twenty-nine member city-county council.

The Supreme Court of Indiana has frequently invoked severability clauses to preserve an otherwise important and valid piece of legislation. See *Welsh, Governor, et al. v. Sells, et al.*, 244 Ind. 423, 192 N.E.2d 753, 193 N.E.2d 359 (1963); *Book v. State Office Building Commission*, 238 Ind. 120, 149 N.E.2d 273 (1958).

However, Section 1503 is a standard severability clause of the type before the Court in the recent voting rights case of *Stout v. Bottorff*, 249 F.Supp. 488, 494 (1965). In that decision the Court relied upon an Indiana Supreme Court decision in *Ettinger v. Studevent*, 38 N.E.2d 1000 (1942), in finding provisions of the statute then before it unserverable notwithstanding the presence of a severability clause. The central holding in the *Ettinger* case is as follows:

> "Where the legislature attempts to do several things one of which is invalid it may be discarded if the remainder of the act is workable and in no way dependent upon the invalid portion. But if that portion is an integral part of the act and its excision changes the manifest intent of the act *by broadening its scope to include subject matter or territory which was not included therein* as enacted, such excision is judicial legislation not statutory construction."

It is possible that severing the last clause of Section 405 would be construed as broadening the scope of the Act within the meaning of the *Ettinger* decision. The issue

of severability is essentially a question of interpretation of Indiana legislation under the Indiana judicial decisions. Severability is essentially a state question from which this Court should abstain. If the effect of the limiting clause of Section 405 is nullified by the state courts under the *Book* case, or by local or state legislative action, then the Act will meet constitutional standards on this point. In any event, at this time there appears to be no reason why the Act cannot by implementation, state court construction, limiting ordinance or amendment by the time of the first Unigov election, be brought to meet federal constitutional standards as pointed out above.

The final contention of the plaintiffs is that the provision for county-wide election of the mayor and for county-wide voter control of the administrative branch of local government constitutes an unconstitutional dilution of their voting rights.

One aspect of the mayoral provisions in that statute which plaintiffs do not complain of but which has been part of the controversy surrounding the case lies in the fact that it is evident that the mayor becomes the chief executive for all governmental functions, including the special service districts, and that the Act grants the mayor considerable powers, including those of appointing departmental heads and board members, and the veto power over legislative actions. Plaintiffs do object to the power of the mayor to appoint the director of Public Safety, which appointment is subject only to confirmation by the twenty-nine member city-county council. The duties and authority of this director are almost completely related to the police and fire special service districts. Plaintiffs also assert that the power of a county-wide elected mayor to require a two-thirds vote to enact legislation on the special service

district council by the exercise of his veto also constitutes an unconscionable dilution of the vote of the Ghetto Area.

However, as the defendants have pointed out, the consolidation of the functions of the city and county governments and the centralizing of control of many previously existing governmental entities into a single consolidated executive branch, was a principal purpose of the Act. The defendants contend that such a purpose is not only within the wisdom and discretion of the Legislature but in fact is essential to the creation of a viable and efficient government designed to meet local needs. They point out that if the Court would accept the contrary position it would require a separate mayor or executive for every single local government function whose territorial boundaries differ in any respect from that of another governmental agency.

Except as noted hereafter, the Court agrees with the defendants on this issue, and that there is no substantial federal constitutional issue on this point. The Court finds that the provision for a single executive and administrative arm of the consolidated government is a proper legislative development and innovation for local government within the terms of the opinion in *Avery v. Midland County*, cited and quoted above. In reaching this determination the Court is impressed with the fact that the Act does provide for numerous changes in the organization of local government in the area involved.

An example in this respect is found in the new Department of Public Works. Before the enactment of Chapter 173 of the Acts of 1969, at least five entities or officers had varying responsibilities over the related governmental concern of sanitation, storm sewers, drains and flood con-

trol. There was a separate governmental entity charged with handling flood control on a county-wide jurisdiction. There was a separate Board of Sanitary Commissioners with responsibilities over sanitary conditions and storm drains with a territorial jurisdiction beyond the city but less than the whole county. There was a County Drainage Board, which, together with the County Surveyor, held considerable authority and responsibility over drainage in areas not within any incorporated city or town. Finally, the Board of Public Works of Indianapolis was delegated certain authority over drainage problems within the city. The governing bodies of the various towns also had a similar function within their units. The Court takes judicial notice that the multitude of statutes, agencies and officials involved made planning and action in the area of the disposition, control and handling of water problems a frustrating task. Chapter 173 of the Acts of 1969 consolidates the functions and responsibilities of these various entities into the single Department of Public Works. It provides for coordination and planning for these related functions on a county-wide basis. Similar consolidations of previously splintered responsibilities are provided for in the Act. It is apparent that the statute, as a whole, is an effort to make needed changes in the area of local government.

As for plaintiffs' assertion that the veto power of the county-wide elected mayor over the legislation of the special service district constitutes an unconscionable dilution of the voting power of the Ghetto, the Court is impressed by the following language in Justice Douglas' opinion in *Dusch v. Davis,* 387 U.S. 112, 118 L.Ed.2d 656, 87 S.Ct. 1554 (1967), in which the consolidated City of Virginia Beach was upheld as constitutional:

> "As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial

> or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster." *Dusch v. Davis, supra,* at U.S. 117, L.Ed.2d 660.

The feature of the statute relating to the councilmanic power of the special service district councils can be determined to be unconstituitonal at this time and before the Act is totally in effect because the voting rights dilution which it would create is predictable and inevitable. This is not so with respect to that feature of the statute which provides that the county-wide elected mayor will have veto powers requiring a two-thirds vote of the special service district councils to enact legislation. No such mayor has been elected or has served in office and the manner in which he might use his veto power can only be a matter of speculation. If, in the future, such veto power has the effect of causing an unconstitutional dilution of the voting power of a legally cognizable group, litigation on this point might become appropriate but absent a showing that the dilution of the voting power of such a group was the outright purpose of the Act as was the case with the statutes involved in *Davis v. Schnell,* 81 F.Supp. 872 (S.D. Ala. 1949), and *United States v. Louisiana,* 225 F.Supp. 353 (E.D. La. 1963), there is no present basis for attacking the constitutionality of the mayor's veto power.

Allegations to the effect that the statute here in question did have an illegal purpose were contained in the complaint including a statement that the statute provided for all-white areas of Indianapolis to be annexed into all-white cities excluded from most of the provisions of the Act, and that the fair housing ordinance of Indianapolis was to continue to have application only within the former City of Indianapolis, *i.e.,* "The Fire District." This, the complaint charged, would inevitably lead to such annexa-

tion of all-white areas within the Fire District with the ultimate result being the creation of three large all-white cities and a Ghetto city. This feature of the statute has been eliminated from a practical standpoint by the enactment of a county-wide fair housing ordinance as one of the first acts of the new city-county council which has recently convened. This, the plaintiffs concede, effectively rebuts their allegations as to the purpose of the Act[3] and constitutes a real step towards the resolution of the problem which is the cause of all Fifteenth Amendment districting cases as was noted in the closing sentence of the first footnote to this opinion.

The exception to the foregoing is acceptance by the Court of the plaintiffs' objection to the manner of appointment of the Director of the Department of Public Safety, whose authority and responsibility relate primarily to the police and fire special service districts functions, and relate very much to the substantive political interests of the Ghetto Area as was shown by the evidence in the *Chavis* case and as is demonstrated generally by the Kerner Report, which also took sharp notice of the substantive question at issue in this cause:

> "It is plain that the Negro ghetto resident feels that he is not represented fairly and adequately under the arrangements which prevail in many cities. This condition strikes at major democratic values. To meet this problem, city government and the majority com-

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[3] Although the Unigov statute was enacted by the Indiana General Assembly, the evidence adopted into this case from the *Chavis* case shows that its actual promoters were the non-gubernatorial defendants who enacted and approved the said fair housing ordinance and the plaintiffs have contended throughout the litigation herein that the motives of the non-gubernatorial defendants should be controlling in determining the purpose of the Act. In view of the United States Supreme Court's decision in *Hunter v. Erickson*, 393 U.S. 385, 21 L.ed. 2d 616, 895 S.Ct. 557 (1968), the enactment of this ordinance cannot be regarded as an empty gesture.

> munity should revitalize the political system to encourage fuller participation by all segments of the community." *U. S. Riot Commission Report*, Bantam, p. 296.

The residents of the districts should have more control over the selection of the person who will be appointed to this position. This Court does not believe, however, that it is necessary to discard the statute's basic administrative structure including the authority of the mayor to nominate the individual for this position. It is the opinion of the Court that the issue can be resolved, and the residents of the special service districts given a proper voice in this matter, if the person nominated is subject to confirmation by the police and fire special service district councils rather than by the combined city-county council. Implementation of this should be properly left to the defendants.

The Court will retain jurisdiction in this cause until the constitutional defects noted herein are resolved. Accordingly, no final judgment shall be entered at this time.

/s/ WILLIAM E. STECKLER

United States District Judge

United States District Court

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

MASON BRYANT, et al., *Plaintiffs,*	)	
v.	)	NO. IP 69-C-115
EDGAR D. WHITCOMB, et al., *Defendants.*	)	

ENTRY FOR FEBRUARY 3d, 1970

This cause came on for trial before the Court, without the intervention of a jury, upon the allegations of Plaintiffs' Second Amended Complaint, and the Answers of the Defendants. Evidence was submitted by both Plaintiffs and Defendants, together with arguments and briefs of counsel.

On February 3d, 1970, the Court entered and filed its written opinion upon the federal constitutional issues presented, which opinion is as follows:

(H. I.)

IT IS ACCORDINGLY ORDERED that the Court shall withhold the issuance or granting of injunctive relief.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this cause for a reasonable period of time for the resolution of the constitutional defects noted in the opinion.

/s/ WILLIAM E. STECKLER

Judge, United States District Court Southern District of Indiana

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-587

OTIS R. BOWEN, AS GOVERNOR OF THE STATE OF INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 74-588

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 74-605

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2–A33)[1] is reported at 503 F. 2d 68. The opinion of the district court (Pet. App. A35–A103) is reported at 368 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1974, and timely petitions for rehearing were denied on October 3, 1974 (Pet. App. A34). The petitions for writs of certiorari in Nos. 74–587 and 74–588 were filed on November 15, 1974. The petition for a writ of certiorari in No. 74–605 was filed in November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in remanding this school desegregation case to the district court to determine, in light of this Court's decision in *Milliken* v. *Bradley*, whether the constitutional violations found by the district court warrant an inter-district remedy.

2. Whether the court of appeals erred in sustaining rulings of the district court appointing commissioners to develop and submit acceptable desegregation plans when the School Board failed to do so, directing the Board to seek available federal financial assistance for operating the school system under court-ordered desegregation plans, precluding further litigation by newly added parties concerning the existence of *de jure* segregation in the Indianapolis school system,

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[1] "Pet. App." refers to the joint appendix to the petitions for writs of certiorari.

and excluding evidence discounting the educational and sociological value of school desegregation.

STATEMENT

On May 31, 1968, the United States, pursuant to 42 U.S.C. 2000c–6(a) and (b), filed a complaint in the United States District Court for the Southern District of Indiana charging the Board of School Commissioners of the City of Indianapolis with racial discrimination in the assignment of faculty and students in the Indianapolis school system (Pet. App. A2–A3). After a trial on the merits, the district court ruled that the Indianapolis School Board was operating a *de jure* segregated school system (*id.* at A157–A209). The court enjoined the Board from discriminating on the basis of race and ordered it to take certain interim affirmative steps toward the establishment of a non-discriminatory school system (*id.* at A207–A209).

The court did not order long-range relief. It found that desegregation solely within the boundaries of the Indianapolis Public School System would be a "simplistic solution" that "won't work," because of the danger that the "tipping point [would] be reached and passed beyond reprieve" (*id.* at A203).[2] The district court concluded that the "tipping point" problem would be alleviated if the city schools of Indianapolis

[2] The court stated that "when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible" (Pet. App. A199). The percentage of Negro pupils in the Indianapolis school system had increased from 20 per cent in 1954 to 36 per cent at the time of the district court decision (*id.* at A185).

were consolidated with surrounding school systems in the metropolitan area (*id.* at A204). It therefore ordered the United States "to prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations" (*id.* at A206) to litigate specified questions relating to the court's power to order relief on a metropolitan basis (*id.* at A202–A206).

On motion of the United States, all school corporation in Marion County (eight townships and two city corporations) were added as parties defendant (*id.* at A5). A few days later, the court permitted two black students (the Buckley plaintiffs) to intervene as plaintiffs and as representatives of a class consisting of "all Negro school age children residing in the area served by" the Indianapolis school board (*id.* at A5–A6). The intervening plaintiffs joined as parties defendant the Governor and Attorney General of Indiana, the State Superintendent of Public Instruction, the State Board of Education, and 19 school corporations (including the 10 within Marion County that had already been joined on motion of the United States, plus nine other school corporations in the adjoining counties of Boone, Hamilton, Hancock, Johnson, Morgan, and Hendricks) (*id.* at A6).

The amended complaint of the intervening plaintiffs alleged that the Indiana statute establishing a consolidated metropolitan government consisting of the City of Indianapolis and Marion County, the so-called Uni-Gov Act,[3] is unconstitutional, because the "purpose and

[3] The Uni-Gov Act, Indiana Code, 1971, §§ 18-4-4-1, *et seq.*, provides that the Indianapolis school district is not affected

effect" of the Act's exclusion of school systems from the consolidation "are to perpetuate segregation on the basis of race and to inhibit desegregation in the public schools and school systems of Marion County" (*id.* at A152). The complaint also alleged that state and local authorities had "effected racial segregation and discrimination in the operation of public schools and school systems serving Marion County * * * and the Indianapolis metropolitan area" (*ibid.*). It sought an order consolidating the defendant school systems or granting some other form of inter-system relief (*id.* at A154–A155).

The district court thereafter ordered the development and submission of comprehensive plans for the desegregation of the Indianapolis Public School System (see *id.* at A6–A7). In response, the Board submitted a plan that the district court later rejected on the ground that the plan would have "result[ed] in no change whatever in the existing segregation" (*id.* at A117).

The court subsequently issued a memorandum of decision on the remedy phase of the case (*id.* at A35–A82). The decision, as summarized by the court of appeals (*id.* at A7–A8), concluded:

> (1) desegregation promising a reasonable degree of permanence could not be accomplished

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by the expansion of the city boundaries. This leaves the Indianapolis Public Schools confined to the central core of the new Uni-Gov, where it is surrounded by eight township school systems and two city school corporations (Beech Grove and Speedway City), all operating independently within the new unified city of Indianapolis and within Marion County (Pet. App. A5). See Indiana Code, 1971, § 18-4-3-14.

within the present boundaries of the Indianapolis school district; (2) the State of Indiana, its officials and agencies, had by various acts and omissions promoted segregation and inhibited desegregation within the Indianapolis district, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has a continuing affirmative duty to desegregate the Indianapolis system; (3) the system could be effectively desegregated either by combining its territory with all or part of the territory served by the 19 surrounding school corporations in and adjacent to Marion County into a metropolitan system and then reassigning students within the expanded system or by transferring black students from the Indianapolis district to the 19 others, either on a one-way or exchange basis; and (4) the state, through its General Assembly, should first be afforded the opportunity to select its own plan; but if it failed to do so, the court would promulgate a plan.

As interim relief, the court ordered that the Indianapolis Board rearrange its student assignments for the 1973–1974 school year so that each elementary school would have a minimum black enrollment of approximately 15 percent (*id.* at A10). After a further evidentiary hearing, the court found that an interim plan submitted by the Board was inadequate. The court found that "the Board is unable or unwilling to comply with the orders of this Court" (*id.* at A106), and it therefore appointed two commissioners "to draw up interim and final plans for the

desegregation of the Indianapolis Public School System" (*id.* at A107). In addition, the court ordered the Board "to proceed forthwith to make the necessary application or applications for Federal funds in all of the various categories available to school systems operating under orders of desegregation" (*id.* at A110). The court thereafter approved an interim plan submitted by the commissioners (*id.* at A111–A115).

The court of appeals affirmed the district court's findings, conclusions, and orders in all respects except insofar as they related to metropolitan-wide final relief. On the issue of inter-district relief, the court of appeals ruled (*id.* at A32–A33; footnotes omitted):

> In accordance with *Milliken* v. *Bradley*, —— U.S. —— (July 25, 1974), we reverse the district court's findings, conclusions, orders, and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries; insofar as they pertain to a remedy within the boundaries of Uni-Gov, we vacate those rulings and remand for further proceedings consistent with that decision. The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of [the Indianapolis school system] boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*.

ARGUMENT

1. The primary contention in each of the three petitions is that the court of appeals should have reversed outright the district court's decision with regard to a metropolitan-wide remedy rather than remanding the

case to the district court for further proceedings. Petitioners rely on this Court's decision in *Milliken* v. *Bradley,* No. 73–434, decided July 25, 1974, which held that inter-district remedial action is unwarranted unless it is "shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district" (slip op. 25). In the present case, however, the court of appeals did not order an inter-district remedy. Instead, it rejected the district court's plan of inter-district relief, reversed outright the portion of the remedy requiring inter-district relief outside the boundaries of Uni-Gov, and explicitly instructed the district court on remand to consider whether an inter-district remedy within the boundaries of Uni-Gov is appropriate in light of *Milliken* v. *Bradley.* Review of the court's decision at this time would be premature.

Petitioners contend that the district court's finding in this case that the suburban school districts were not operating *de jure* segregated schools forecloses the possibility of interdistrict relief and that no useful purpose could be served by remanding this case to the district court for further proceedings. But, since the district court had explicitly declined to consider whether the Uni-Gov statute had the purpose or effect of promoting segregation (Pet. App. A65), it was appropriate in light of *Milliken* for the court of appeals to remand the case to permit consideration of the purpose and effect of that statute.

The history of the school district boundaries in the present case differs from that in *Milliken,* where

there was no suggestion that boundaries "were established for the purpose of creating, maintaining or perpetuating segregation of races" (slip op. 29). Here, the district court found that, under the common law of Indiana, "boundaries of a school district and of a civil city were coterminous" (see Pet. App. A4)[4] and that the Uni-Gov Act—which consolidated for most purposes the civil governments of the City of Indianapolis and of Marion County into a unified, metropolitan government—expressly provides that the Indianapolis school district would *not* be affected by the expansion of the city. Indiana Code, 1971, § 18–4–3–14.

The district court did not have available at the time of its ruling the guidance of this Court's opinion in *Milliken*. On remand, it will have the opportunity to make further findings in light of that opinion, to consider both the similarities and differences between this case and *Milliken*, and to apply the principles of that decision to the Indianapolis situation. Only after such consideration by the district court is completed will further appellate review be appropriate.

2. The petitions raise several other issues that do not require extended discussion. In No. 74–605, the School Board contends (Pet. 25–29) that it was error

[4] This common law rule was recognized by statute in 1931. Indiana Code, 1971, § 20–3–11–1. Statutes enacted in 1961 and 1969 (Indiana Code, 1971, §§ 20–3–14–1, 20–3–14–9, 20–3–14–10) provided that, if the boundaries of Indianapolis were extended, those of its school district could likewise be extended. The school district extension, however, was subject to a separate remonstrance or could be vetoed b a specified percentage of persons.

for the district court to order it to seek federal funds that are available to school systems operating under desegregation orders. The order, however, was properly within the discretion of the district court. In *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 233, this Court held that a district court has the power to order local authorities to levy taxes in order to operate a public school system without discrimination. It follows that the court may in appropriate circumstances require a school board to take the less burdensome step of making use of available funds as part of an effort to rid the public schools of racial discrimination.

Similar orders have been issued in other school desegregation cases. For example, in *Oliver* v. *Kalamazoo Board of Education*, 368 *F. Supp.* 143, 205 (W.D. Mich.), affirmed, Nos. 74–1104 and 74–1105, December 9, 1974 (C.A. 6), the district court ordered the school board "to apply to the federal government for such financial assistance as may be available to aid the Board in executing the present order of this Court."[5] It is the responsibility of the district court to ensure the implementation of a workable plan for desegregation. See *Brown* v. *Board of Education*, 349 U.S. 294, 299. The Board has not shown that the federal funds would not be useful for that purpose or that it would suffer any actual harm from using

[5] See also *Whittenberg* v. *Greenville County School District*, 298 F. Supp. 784 (D.S.C.); *United States* v. *State of Texas*, 342 F. Supp. 24 (E.D. Tex.), affirmed without opinion, 466 F. 2d 518 (C.A. 5); but compare *Plaquemines Parish School Board* v. *United States*, 415 F. 2d 817 (C.A. 5).

the federal funds. In the absence of such a showing, the order of the court is within its sound discretion.[6]

Two issues concerning evidentiary rulings are raised in the petitions. Neither issue, in our view, is ripe for review by this Court, since the court of appeals remanded this case for further proceedings in the district court.

First, petitioners in Nos. 74–587 and 74–588 contend that they were denied due process of law because they were precluded from attacking the findings made by the district court in the violations phase of the case, not having been made parties to the litigation until after that aspect of the case had been concluded. But the district court's holding was only that *de jure* segregation within the boundaries of the Indianapolis Public School System was *res judicata* (Pet. App. A36). Other issues addressed in the earlier phase of the case, including the "tipping point" and the action of state and local officials (other than the Indianapolis School Board members), were subject to full inquiry in the later remedy phase (*ibid.*). The issue of *de jure* segregation in the Indianapolis system had been fully litigated, *United States* v. *Board of School Commis-*

[6] The Board also contends (Pet. 29–34) that the court erred by rejecting the plan it offered and appointing commissioners to draw up a plan for the court. It is the obligation of the court, however, to assess the effectiveness of a proposed plan and to ensure that an effective plan is implemented. "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system" (*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16). The Board has not shown that the court abused its discretion in this case.

sioners, 332 F. Supp. 655 (S.D. Ind.), affirmed, 474 F. 2d 81 (C.A. 7), certiorari denied, 413 U.S. 920, and petitioners have not disputed the resolution of that issue. Cf. *Bradley* v. *Milliken,* 484 F. 2d 215, 252 (C.A. 6), reversed on other grounds, No. 73–434, decided July 25, 1974.

Petitioner in No. 74–587 also contends (Pet. 22–25) that it was error to exclude the testimony of Ernest van den Haag and David Armor discounting the educational and sociological value of integration. But this is a case involving *de jure* segregation in public schools. *Brown* v. *Board of Education,* 347 U.S. 483. Desegregation of such a school system has been required under all relevant decisions of this Court from *Brown II* to the present. The proffered testimony could present no pertinent information, and precedent uniformly supports the exclusion of such evidence, unless those decisions were to be re-examined, a course which petitioners have not suggested and which in any event would be inappropriate at this time. See *Stell* v. *Savannah-Chatham,* 318 F. 2d 425 (C.A. 5); *Mapp* v. *Board of Education,* 477 F. 2d 851 (C.A. 6) (*en banc*), certiorari denied, 414 U.S. 1022; *Northcross* v. *Board of Education,* 466 F. 2d 890 (C.A. 6), certiorari denied, 410 U.S. 926.

CONCLUSION

The petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-588

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, AND THE SCHOOL CITY OF BEECH GROVE, INDIANA,

Petitioners,

VS.

UNITED STATES OF AMERICA, DONNY BRURELL BUCKLEY, ET AL.,

Respondents.

REPLY BRIEF OF PETITIONERS THE SCHOOL TOWN OF SPEEDWAY AND THE SCHOOL CITY OF BEECH GROVE, INDIANA TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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Respondents.

REPLY BRIEF OF PETITIONERS THE SCHOOL TOWN OF SPEEDWAY AND THE SCHOOL CITY OF BEECH GROVE, INDIANA TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

This reply brief is filed by petitioners The School Town of Speedway and The School City of Beech Grove, Indiana, in reply to the "Brief for the United States in Opposition."

The United States has presented no logical or legal reason in support of the order for remand entered by the Seventh Circuit Court of Appeals. The fundamental infirmity in the Brief of the United States and such remand order, lies in the failure to recognize that under

Milliken there can be no causal relationship arising out of Uni-Gov which could possibly provide a foundation for an inter-district remedy. This is so because, although petitioners were alleged by intervening plaintiffs to have committed discriminatory acts, petitioners were affirmatively found by the trial court to have operated unitary systems for and within the separate City and Town which petitioners serve.

Nowhere in its Brief does the United States attempt to logically or legally specify how Uni-Gov could possibly, in any way, justify an inter-district remedy. The United States contents itself with stating that Indiana law at one time generally provided that school boundaries were coterminous with civil city boundaries and that Uni-Gov did not expand the school boundaries of the Indianapolis Public Schools (IPS) to the four corners of Marion County at the same time the civil boundaries of the City of Indianapolis were so extended. Since Uni-Gov did nothing to cause segregation in any district or to change the boundaries of the eleven independent school corporations which had existed in Marion County for more than half a century, petitioners find it impossible to understand how an inter-district remedy could be predicated upon this feature of Uni-Gov. Segregation was found only in IPS, and "without an inter-district violation and inter-district effect, there is no Constitutional wrong calling for an inter-district remedy." *Milliken v. Bradley*, 41 L.Ed. 2d 1069 at 1091 (1974).

Moreover, any attempt to understand the position of the United States and the remand order is rendered even more difficult when it is applied to these petitioners. Petitioners The School Town of Speedway and The School City of Beech Grove have boundaries which are respectively coterminous with the Civil Town of Speedway and

the Civil City of Beech Grove, Indiana. If, as the United States maintains, Uni-Gov should have created one school corporation enveloping all of Marion County, then the Civil Town of Speedway and the Civil City of Beech Grove would not have school districts coterminous with their boundaries. These petitioners would then have "suffered" the same effect which the United States complains of in respect to Uni-Gov.

The contentions of the United States may be reduced simply to this: The Indiana Legislature should have enacted legislation which would have effectively eliminated all eleven separate, independent school districts situated in Marion County, including the school districts serving the Town of Speedway and the City of Beech Grove, and combined all of these school districts into one mammoth district. The sole rationale for this contention must ultimately rest, not upon inter-district discrimination as defined in *Milliken,* but rather upon the trial court's conjectural finding that a stable racial mix acceptable to the trial court could not be effected in IPS alone. (Jt. App. pp. A-202-204). Such a rationale has specifically been rejected by this Court:

> "If we were to read the holding of the District Court to require, as a matter of substantive Constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1 at 15 (1971).

Nor is this case premature, as the United States also argues. The factual history of these petitioners and all other parties is already in the record made in this action.

The statutory history of Indiana schools can be fully explored by briefs on the merits. The finding of the trial court that petitioners did not discriminate has not been contested on appeal and is the law of this case. There is thus nothing more to consider on remand which could alter the result which ultimately must be reached or which could provide a foundation for an inter-district remedy.

But even if all that has been said by petitioners is assumed *arguendo* to be lacking in merit, there still exists an important reason for the grant of certiorari in this case. Like the Brief of the United States, the opinion of the Seventh Circuit Court of Appeals below is devoid of any reasoning specifying the rationale of the remand, despite the fact that the Uni-Gov issue was fully litigated in the trial court. The Uni-Gov—*Milliken* inter-relationship, if any exists, is left undefined by the Court of Appeals. Upon remand the trial court would be provided only with the directive of the Seventh Circuit to "determine whether the establishment of the Uni-Gov boundaries without a like establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." (Jt. App. p. A-33). Thus, what was said by this Court in *United States v. General Motors Corp.*, 323 U.S. 373 (1944) is applicable here:

> "The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case." 323 U.S. at 377.

Even if the Court of Appeals did not err, at the very least certiorari should be granted so that guidance may be provided to the lower courts in the further conduct of this action.

Little comment is required in response to the arguments of the United States relating to the trial court's holding that petitioners were bound under the doctrine of *res judicata* to the segregatory findings made against IPS in a trial in which petitioners did not participate. First, the United States says:

> "But the district court's holding was only that *de jure* segregation within the boundaries of the Indianapolis Public School System was *res judicata.*" (Brief for the U.S. In Opposition, p. 11).

While this statement is correct, the inference is that such holding was insignificant. To the contrary, the finding of segregation against IPS has provided the fundamental predicate to all of the litigation involving these petitioners. Petitioners were brought into this action because of the desire of the trial court to formulate an inter-district remedy, and the finding of segregation made against IPS was the foundation stone of this entire action.

Next, the United States says that "The issue of *de jure* segregation in the Indianapolis system had been fully litigated. . . ." (*Id.* at p. 11). With this petitioners agree. However, that litigation was conducted only by IPS. Petitioners, on the other hand, were precluded from litigating this issue in violation of their fundamental rights to due process of the law.

Lastly, on this subject the United States says that "Petitioners have not disputed the resolution of that issue." (*Id.* at p. 12). If by this the United States means that no evidence was adduced at the trial in which petitioners participated relative to the finding of segregation made against IPS, the United States is correct. However, as has previously been discussed in detail in petitioners' original brief filed herein, the trial court

affirmatively and unequivocally precluded petitioners from introducing any evidence or taking any actions at trial which would have contested the segregatory findings made against IPS. Petitioners do in fact dispute the resolution of such issue but were denied the opportunity to do so.

Petitioners respectfully submit that the weakness of the position of the United States on the *res judicata* holding is apparent from the failure of the United States to cite a single authority in support of their position and the total absence of any discussion relative to the authorities cited by petitioners.

CONCLUSION

The Courts below have violated the Constitutional rights of these petitioners by binding them to a judgment made in an action in which petitioners were never parties and by precluding petitioners from litigating one of the fundamental issues in this case. The Court of Appeals has further erred in remanding this case for further proceedings in the face of affirmative findings that petitioners operated unitary school systems at all pertinent times — a finding which under *Milliken* forecloses an inter-district remedy. At the very least, the absence of specific guidelines for further proceedings on remand necessitates a grant of certiorari in this case so that this long pending litigation may be expeditiously terminated and petitioners allowed to concentrate on the business of providing educational facilities for the citizens of their communities.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-587

OTIS R. BOWEN, as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;
THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA;
THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA;

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Pursuant to Rule 24(4) of the rules of this Court, the Petitioners submit this Reply to the Brief of the United States in Opposition to the Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners do so because the Brief of the United States appears, almost totally, to mischaracterize this case as it is presented in the Supreme Court. The Brief of the United States also misrepresents, by non-disclosure, the position and roll of the United States in this litigation in each court below.

Mr. Justice Cardozo and this Court said in *Shepard v. United States,* 290 U.S. 96 (1933), that it was unfair for the Solicitor General to alter his position on appeal, and to take a posture different than that taken at trial. That case concerned the admission of evidence.

In this case, the Solicitor General has altered the position of the United States on the entire case.

Petitioners also file this reply Brief to emphasize that the United States has never asserted a claim in the District Court against any of the Petitioners herein. The United States filed a complaint against the Indianapolis Public School System (hereafter IPS) in 1968 pursuant to 42 U.S.C. 2000c-6(a). However, it is interesting to note that in the ensuing seven (7) years the United States has never produced any claim against any of the Petitioners herein, nor any statutory authority for it to proceed as a party against the Petitioners in any of the courts below, nor does it do so here.

It must also be emphasized that the Intervening Buckley Plaintiffs in the District Court have totally failed to file any brief in this Court in opposition to the Petitions for Writ of Certiorari filed in this matter.

I. In The District Court

There were two complete trials in the District Court, which resulted from two complaints. The first trial was

in 1971, and was the result of a complaint filed in 1968 by the United States against the Indianapolis Public School System (it is the only complaint the United States has ever filed in this entire litigation — it has never proceeded against the Petitioners, below).

The second trial was in 1973, and was the result of a complaint filed as a class action in 1971 by the plaintiffs Buckley against the original defendant Indianapolis Public School System and the "added defendants" which were the State Petitioners here, and twenty (20) additional school systems in the metropolitan area of Indianapolis, Indiana. The enrollment of those twenty-one (21) school systems for 1972 was approximately 205,175 school children.

In those seven (7) years of litigation, the United States was allowed to participate as a litigant although it never filed a claim against these Petitioners. In seven (7) years of litigation, and two (2) trials, only the Indianapolis Public School System was found to be *de jure* segregated.

The District Court found that all of the other school systems (among which are the Petitioners here) were not *de jure* segregated systems. That finding has never been contested by any party, until now by the United States, and for the first time in this Court.

The United States in those seven (7) years:

(1) Never filed a complaint against these school system Petitioners, or the State Petitioners;

(2) Never sought relief against these school system Petitioners, or the State Petitioners;

(3) Did not discover or offer evidence adverse to the interest of any of these Petitioners;

(4) Did not seek findings, or offer to the trial court findings, against these Petitioners;

(5) Did fully participate in the trial against the Petitioners, and it did offer extensive evidence directed to the question whether an I.P.S. only plan could be effected;

(6) Did state in a pre-trial submission in 1971, and during the course of that trial, that if these Petitioners were shown to have engaged in interdistrict violations, then it would seek relief against them (Tr. 8-9). None was found, and the United States has never contested that absence as error on the District Court's part;

(7) Never contested or questioned in the Court of Appeals the finding in the District Court that the Petitioner school systems were not illegally segregated school systems; and

(8) In the concluding arguments, the United States said, by counsel who attended almost every day of trial and offered a large quantity of evidence, that:

> ". . . On the question of whether racially discriminatory conduct has been shown, our stated position has been that if the [petitioners here] have engaged in intra-district violations, that is, constitutional violations, that in some manner involved *two or more school districts, then some relief against them may be warranted. Upon the evidence that has been presented, we are unable to discern the existence of such violations.*" (Emphasis added) (Tr. 2818)

On brief in this Court the Solicitor General characterizes the second trial in the District Court, (which concluded by that Court finding that these petitioner schools were not illegally segregated schools) as "a memorandum of decision on the remedy phase of the case" (Brief of the

Solicitor General page 5) in which the District Court "declined to consider whether the Uni-Gov statute had the purpose or effect of promoting segregation" (Id. page 8).

But the Solicitor General did not disclose on brief in this Court that in the District Court the United States, after a long trial in 1973, said in closing argument:

> "Our analysis of that legislation [the Uni-Gov statute] persuades us that any inferences of unconstitutional purpose or effect that might be drawn on the present state of the record would be tenuous. Moreover, there *does appear to have been some legitimate interests involved which provide justification for the exemptions of school districts from the Uni-Gov consolidation.*" (Emphasis added) (Tr.9)

The position of the Solicitor General in this Court is not only contrary to that taken in the District Court, but it does in fact totally impeach the United States own position in the District Court and it asks, in effect, that the petitioners should suffer the burden because of that change of position.

Here the Solicitor General cites (Id. page 9) a statement made by the District Court in 1971, (which was clearly erroneous and not pursued by the District Court in the second trial for that reason) on the boundaries of a School district and of a Civil city under Indiana common law. After the District Court's 1971 statement, the United States fully participated in the second proceeding from August of 1971 to July 20, 1973, which involved that very question and the question of the impact of the "Uni-Gov" legislation. At the end of that trial, after very careful examination, the United States arrived at the conclusion set out above. Namely, that in the opinion of the United States, and in its analysis of that legislation any inference

of unconstitutional purpose or effect would be tenuous at best.

The United States seeks here, simply, a chance to relitigate a case, after it commenced this proceeding in 1968, and after the "Uni-Gov" legislation was enacted in 1969, in the sure and certain hope that the District Court will, finally, enter a finding against the Petitioners, which the United States would then vigorously defend under F.R.C.P. 52.

II. In the United States Court of Appeals

In the Seventh Circuit in the 1973 appeal, which forms the bases for these petitions, the United States filed two briefs, one as an "Appellant" and one as an "Appellee." In that latter brief, the United States, as represented in the Seventh Circuit,[1] assumed an affirmative answer to the very question in this case: Can desgregation in a single district be effected by an inter-district remedy against school corporations not involved in, and whose acts did not cause, the single district segregation and which have been found in fact not to be illegally segregated?

There the United States by fiat asserted a right of inter-district relief against these petitioners whether or not there was any inter-district violation. The factual discussion in that brief did not go to an inter-district violation, but only to the kind of inter-district relief which could have been granted, if the assumption of the United States were correct.

Nevertheless, on oral argument after the submission of the briefs by the United States, counsel for the United

1 Compare the position of the Solicitor General before this Court in *Bradley v. Milliken*, 94 S.Ct. 3112 (1974).

States, Mr. Landsberg, admitted, in answering a question in the Seventh Circuit, that in fact the District Court had found these Petitioners not guilty of *de jure* segregation.

But it was hardly a moment pregnant with meaning because in fact the United States never challenged those findings in either court below. But it now does that, implicitly, in this Court, and *for the first time* in this case.

III. In This Court

Here the Solicitor General asserts that it is too soon to review the Court of Appeals decision (Sol. Gen. Brief page 8), and that the District Court did not have this Court's opinion in *Milliken* available for its own education.

Such a position can now be taken only by counsel who did not litigate this case in the trial court.

In fact, the District Court placed its total reliance on the Sixth Circuit's opinion in *Milliken,* and modeled its theory after the Sixth Circuit, because it was the only way—there being no factual or other legal basis for a finding against these school Petitioners—that it could extend its judicial power over those school systems, and these Petitioners. What the District Court would do for metropolitan Detroit, the District Court wanted to do for metropolitan Indianapolis, but there was a critical difference.

Unlike the District Court in *Milliken,* in Indianapolis the District Court *found* that the additional school systems and these Petitioner schools were not segregated school systems.

In short, this case was in a *post-Milliken position* in the Seventh Circuit, and it is here too: the finding which was

never made in *Milliken* about the non-Detroit school systems, was in fact made by the District Court on July 20, 1973. That is, that the additional school systems were not illegally segregated.

Nevertheless, in disregard of its own findings but consistent with the Sixth Circuit's *Milliken* decision, the District Court below entered extensive orders against the non-segregated schools, and those were appealed to the Seventh Circuit. That Court correctly set the orders aside for the non-Marion County Schools, and reversed the District Court. It incorrectly failed to do that for the non-segregated schools in Marion County, Indiana, which are separate and distinct school districts from I.P.S.

The finding of no *de jure* segregation remains as the controlling finding in this school desegregation case, as it is the controlling finding in all school desegregation cases. There is no judicial power in equity absent a finding of a Constitutional violation, or in the presence of a finding that there was no violation. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Swann v. Board of Education*, 402 U.S. 1 (1971); *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973).[2]

Regardless of the form in which a question of fact or law may appear in a school desegregation case, it is subordinate to the controlling finding that a school either is or is not an illegally segregated system. No question will rise higher than that ultimate finding.

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2 It is totally unclear why the Solicitor General and the Assistant Attorney General for the Civil Rights Division of the Department of Justice seek to disregard this well established legal principal that this Court has consistently recognized in these cases, and seek instead to have this Court allow a multi-district remedy against separate and distinct school districts found not to be guilty of *de jure* segregation.

In seven (7) years of litigation in the courts below, no question of fact or law, including the enactment of "Uni-Gov" in 1969, which was one (1) year after the United States filed its Complaint, two years before the first trial ended, and a full four years before the the second trial ended, was greater than or superior to the *found fact* that the Petitioner school systems were not illegally segregated schools.

Conclusion

The finding of no *de jure* segregation by the Petitioner schools was made in the District Court, and it was not challenged directly by any party, or by the Court of Appeals. It was binding on the Court of Appeals, which acknowledged it by correctly reversing the District Court as to those school systems outside Marion County, Indiana.

That same finding is binding here, and it is indeed legally and ethically binding upon even the Solicitor General of the United States, and the Assistant Attorney General for the Civil Rights Division of the Department of Justice. In the Courts below, their attorneys understood and acknowledged that fact.

However, in this Court the Solicitor General seeks a result that the finding of no illegal segregation by the District Court be, in effect, disregarded; and that after litigation for seven (7) long years, several years more shall be the order of the day in Indianapolis. That position is taken here because of the error which was made by the Court of Appeals.

This Court should grant the Writ of Certiorari and reverse that part of the decision of the Court of Appeals

which remanded the case to the District Court for yet another trial.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

FEB 20 1975
MICHAEL RODAK, JR., CLE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-605

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

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-vs-

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

I.

The issue presented in question No. 1 of the Petition presently pending before this Court originated from a trial held pursuant to a Complaint filed by the Intervening Plaintiffs, Buckley, et al., in October of 1971. The Intervening Plaintiffs, Buckley, et al., Respondents herein, have filed no brief in opposition to the Petition for Certiorari. However, the United States, although having never filed a complaint seeking inter-district relief or challenging the constitutionality of the Uni-Gov

Statute, has now filed a Brief in Opposition urging this Court to deny review of the decision of the Court of Appeals for the reason that review at this stage of the litigation would be "premature." In so doing, the United States has not only completely reversed its position after nearly seven years of litigation, but also, by failing to disclose its prior position, it misrepresents the nature of the litigation which previously occurred thereby diluting the significance of the District Court's Findings of Fact.

At the trial of this matter in 1973, the Intervening Plaintiffs, Buckley et al., attempted to establish numerous types of inter-district violations and challenged the constitutionality of the Uni-Gov Act. Counsel for the United States was permitted to participate and did, in fact, participate in those proceedings. At the conclusion of the trial, during final argument, counsel for the United States stated:

> "* * * On the question of whether racially discriminatory conduct has been shown, our stated position has been that if the added Defendants have engaged in intra-district violations, that is, constitutional violations, that in some manner involved two or more school districts, then some relief against them may be warranted. Upon the evidence that has been presented, we are unable to discern the existence of such violations.
>
> * * *
>
> "Our analysis of that legislation (Uni-Gov) persuades us that any inferences of unconstitutional purpose or effect that might be drawn on

the present state of the record would be tenuous. Moreover, there does appear to have been some legitimate interests involved which provide justification for the exemption of school districts from the Uni-Gov consolidation." (Our emphasis) (Tr. 2818-19)

The controlling finding of fact in this case is that all of the school systems located outside of the Indianapolis Public Schools were found to be operating unitary school systems; none of those school systems were found to have committed any act of de jure segregation. This finding was entered at the conclusion of a hearing wherein the issue for which this case has been remanded was fully litigated. Not one party to those proceedings, including the United States, challenged the validity of that finding on appeal; nor, did any party, including the United States, object to the Trial Court's failure to make other findings. That finding was recognized by the Court of Appeals as sufficient to compel the reversal of the District Court's Order requiring the inter-district transportation of pupils insofar as that Order pertained to school systems located outside of Marion County; it is respectfully submitted that that finding is conclusive of this entire litigation, and that it compels the reversal of the Court of Appeals insofar as it has ordered further proceedings involving the school systems located within Marion County.

II.

On Brief, the United States has cited Griffin v. County School Board of Prince Edward County, 377 U. S. 218 (1964), Whittenberg v. Greenville

Co. School District, 298 F. Supp. 784 (D.S.C. 1969), United States v. State of Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd. without opinion, 466 F.2d 518 (1972), and Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143 (W.D. Mich. 1973), as authority for the District Court's Order directing the Indianapolis School Board to apply for all available federal funds. These cases are easily distinguishable on their facts, or it can be shown that they are of highly questionable precedential value.

In Griffin, supra., the record could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with State and County assistance for one reason, and one reason only:

> "To insure, through measures taken by the County and the State, that White and Black children in Prince Edward County would not, under any circumstances, go to the same school. Whatever non-racial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and the grounds of race and opposition to desegregation do not qualify as constitutional." 377. U.S. at 231.

Thus, the Supreme Court's allowance of a District Court's Order that the County levy school taxes was grounded on three crucial factors. First, that the levying of local taxes to operate public schools was a method of financing expressly provided by a Virginia state law. Second, that the refusal of the County School Board to levy these taxes thereby closing the schools, was

motivated solely by a desire to operate segregated schools. Third, unless the local School Board levied local school taxes, it would be impossible to operate a non-segregated public school system in the county. In fact, there would have been no public schools.

None of these factors were present in the Indianapolis School Board's case. The use of federal funds is not the means provided for by the State of Indiana for financing public instruction. The State has no law whatever requiring that federal funds be used. In fact, the State provides ample funds for the operation of the public schools, and federal funds are merely additional or extra funds which are not necessary for the operation of the schools. Second, there is absolutely nothing in the record of the Indianapolis case remotely indicating that the refusal of the Indianapolis School Board to apply for all federal funds available was motivated by a desire to operate a racially segregated school system. There was absolutely no showing that discrimination was occurring through the failure to use federal funds, no showing that the Indianapolis Public School system did not have available local funds, and no showing that these available local funds were not being used to assist in human relations. In fact, the Indianapolis Public Schools at the time had 4,000 teachers who were daily engaged in the art of human relations, and over 70 social workers. This entire issue in the Indianapolis case was injected by the Court simply because of the philosophy of the Court. This is brought out very clearly by the Court's statement during the hearing as follows:

"I would think that people who are concerned about certain costs that you have

mentioned, on the one hand, should be interested, on the other hand, in picking up whatever the federal government has to give you, which I am sure would be well in excess of a million dollars -- probably substantially more than that - and spending it on human relations. And it is not limited to that. There is a whole category of things that you can spend it for, including modification of facilities, all sorts of things. Incredible! -- how you'd permit the taxpayers of this city to pay their taxes to the federal government, and you are entitled to get part of the (sic) back, and you just sit here and say, 'Forget it.' I don't understand that type of thinking." (Our emphasis.)

It is clear that the Court was requiring the application for federal funds for "all sorts of things," whether related to desegregation or not. And this was so, simply because the taxpayers "of this city pay their taxes to the federal government." This is further borne out by the subsequent statement of the Court at p. 129 of the Transcript of the August 20, 1973, hearing as follows:

> "*** for which you are ordered to apply forthwith, not later than Friday of this week, for all the money that you can possibly think of." (Our emphasis.)

It is therefore clear that these funds running into the millions of dollars will be expended under guidelines of the federal government, whether local officials like it or not. Furthermore, they will be expended for whatever can be thought of. It is little solace to a local official who desires to do his duty

respecting expenditures of taxpayers' money, and who desires to be frugal in that regard, to be required to spend all he can "possibly think of" and be given this honor as a "local official." Furthermore, whether the money is federal money or state money, it is still taxpayer money, and the philosophy that a local school board must spend all the federal money it can possibly get its hands on is incredible.

That this should become the basis for a federal court order is without any precedent. The Order is an unconstitutional usurpation of local authority and violates the Tenth Amendment to the Constitution of the United States. In response to this contention, the United States contends that there has been no harm shown. It is respectfully submitted that the harm is implicit in the Order. A court order which violates the United States Constitution is harmful in and of itself without further explanation. Nevertheless, there is a readily ascertainable harm in that the people of Indianapolis as a result of this order have been deprived of their right, through their duly elected representatives, to decide whether to seek federal aid or to select which federal programs they might find desirable. They are now required to seek all federal aid available without regard to what controls may follow. This Court, in San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973) held that local authorities could choose their system of school financing. This decision expressly repudiates any thought that a local governmental body must justify a failure to apply for any federal assistance, or show a specific harm to avoid losing the right to object

that the Federal Government is usurping the power of the local government. In this regard, this Supreme Court stated in San Antonio Independent School District v. Rodriguez, supra, at pages 1306-1307:

> "That is, they may believe that along with increased control of the purse strings at the State level will go increased control over local policies."

Thus, this Supreme Court, in 1973, stated that a local school board was not even required to seek state aid, much less federal aid.

Next, the United States cites the case of Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143, 205 (W.D.Mich.), aff'd., Nos. 74-1104 and 74-1105, Dec. 9, 1974 (C.A. 6), for support of its contention that a District Court has power to order a school board to apply for federal funds. In the first place, on appeal of Oliver, supra, this issue was not even discussed. Secondly, the record in the case of Oliver v. Kalamazoo Board of Education, supra, will show that the School Board voluntarily applied for federal aid and that the Order of the Court was subsequent to and merely adopted such voluntary application. Therefore, the Order of the District Court in that case was not even directed to this issue and is of no precedential value whatever. To support the arguments that the record will disclose that the application for federal funds was voluntary on the part of the Board in Kalamazoo, supra, the following language of the decision is interesting:

"Although the May 7, 1971, decision desegregation plan was somewhat modest, it was voluntarily adopted by responsible Kalamazoo school authorities in a bona fide effort to bring substantial equality of opportunity to all children in Kalamazoo as mandated by the Constitution. Since the Kalamazoo authorities were responsibly performing their constitutional duties when they adopted the May 7 Plan, this Court has also adopted it as the basis for its remedy." (p. 204) (Our emphasis.)

Next, the United States cites in a footnote at page 10 of its Brief the case of Whittenberg v. Greenville County School District, 298 F. Supp. 784 (D.S.C. 1969). This case, decided by a three-judge panel, is not even pertinent. A cursory reading of that case shows that there was no order whatever directing the School Corporation to seek federal financial aid. The Order, which appears at pp. 790-791 of that opinion, merely directs that the school corporation try to reach an agreement with H.E.W. and absent such agreement, H.E.W. was requested to submit an acceptable plan to the Court.

Next, the United States cites the case of United States v. State of Texas, 342 F.Supp, 24, 29, 37-38 (E.D. Tex. 1971), aff'd without opinion 466 F.2d 518 (C.A. 5). An affirmance without opinion is of no precedential value under Court Rule 21. N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (C.A. 5, 1970). This case clearly states that in those cases where there is no opinion that the case has no precedential value. The pertinent language

is found at p. 972 of 430 F.2d 966, as follows:

> "By Rule 21, the Court no only implicitly assumes the responsibility for evaluating this factor, but also is specifically commanded to make the conjunctive judicial determination that an opinion would have no precedential value." (Our emphasis.)

Upon examination of the affirmance at 430 F. 2d 973 (1970), and the original court decision at 342 F. Supp., 24, 29, 37-38, it is clear that the school districts involved and the United States had agreed upon a plan which involved application for federal funds, and asked the Court of Appeals to remand to the District Court so that the plan could be implemented. Thereafter, the parties disagreed respecting details of implementation, and the District Court merely ordered the implementation of the plan originally agreed upon. Apparently, the issue of a requirement to seek federal funds was not even presented to the Court of Appeals, or else the Court of Appeals surely would not have affirmed without an opinion on such an important issue. In any event, that case cannot be cited for precedential authority, and it is inconceivable that the Court of Appeals for the Fifth Circuit would have overruled its decision in Plaquemines Parish School Board v. United States, 415 F.2d 816 (C.A. 5, 1969), without an opinion. As set forth in Petitioners' original Brief, at p. 26, the Fifth Circuit in Plaquemines Parish School Board v. United States, supra, reversed an order identical to that complained of in the present case. In reversing, the Fifth Circuit stated what it believed to be an exception to the rule:

"This direction is without prejudice to the right of the District Court in the future in a specific situation as to specific funds to require that application be made when it is shown that the Board has failed to apply for such funds as part of a plan or scheme to impede the end of a dual system of schools, or to discriminate against Negro children." 415 F. 2d at 833.

There was absolutely no evidence whatever which would bring this case into those words of exception. Therefore, the case of Plaquemines Parish School Board v. United States, supra, was erroneously relied upon by the Government, and the Court of Appeals for the Seventh Circuit. Therefore, Plaquemines should control this decision and calls for a reversal thereof. The only other conclusion that can be drawn, is that there is now a conflict between the Seventh Circuit and the Fifth Circuit on this issue. However, the United States Court of Appeals for the Seventh Circuit seems to be relying upon the Plaquemines decision, and therefore it would seem that the decision should be reversed because of the erroneous application of Plaquemines to the present factual situation.

At this juncture, it is again appropriate to repeat the significant language of San Antonio Independent School District v. Rodriguez, supra, wherein this Court stated:

"The people of Texas may be justified in believing that other systems of school finance, which place more of the financial responsibility in the hands of the state, will result in a comparable lessening of the desired local autonomy.

That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies." 411 U.S. at 51-52. (Our emphasis.)

Of course, the same proposition applies with even greater force when viewed in the context of federal funds and increased federal control over the fiscal policies of local school systems.

In cases such as this, the federal intrusion upon local governmental powers is not limited to interference with fiscal policies, nor is it limited to the control that the federal government will be permitted to exercise over the expenditures of the funds obtained and the educational programs maintained therewith. There are significant "side effects" which go hand-in-hand with federal aid to public education. A good example of this can be seen in recent federal legislation, P. L. 93-380, passed August 21, 1974. Under these two educational amendments, entitled "Protection of the Rights and Privacy of Parents and Students," and "Protection of Pupil Rights," respectively, schools receiving federal aid are required to strictly observe numerous requirements, including but not limited to, procedures regulating the maintenance of student records and the disclosure of the contents of said records. Therefore, if the Indianapolis schools do not comply with these new requirements, they would presumably lose their federal aid and thereby be in contempt of Judge Dillin's Order. It seems the Indianapolis schools are permanently wedded to all federal aid and regulation by virtue of this Order.

The issue before this Court does not involve a dispute as to whether federal aid to education is desirable from an educational standpoint; indeed, that is one of the most controversial subjects discussed by educators throughout the nation today. Rather, this case involves the constitutional right of duly elected local school officials to choose between local funding and federal funding for the maintenance and operation of a local school system. If the decision of the Court of Appeals is allowed to stand, the constitutional rights of the Indianapolis School Board will have been judicially repealed, and the Court's decision will serve as precedent for the abolishment of similar rights presently reserved to other forms of local government with the ultimate result that the Tenth Amendment to the Constitution of the United States will have been judicially repealed in its entirety.

III.

The Board of School Commissioners of the City of Indianapolis, Petitioners herein, have alleged that the District Court erred in placing the Board in default for submitting an unacceptable desegregation plan and in appointing Court-appointed Commissioners to fashion a desegregation remedy. On Brief in Opposition, the United States has contended that a District Court has the power to reject a desegregation plan if it is found by the Court to be unacceptable. Unfortunately, the contention of the United States is not directed to the issue before this Court, and it is nothing more than an attempt to mischaracterize the question presented. Stated again, the question before this Court is directed to the propriety of a default ruling; it does not involve

the power to reject an unacceptable desegregation plan.

The specific finding which led to the District Court's ruling that the Indianapolis School Board was in default was:

> "That the Board is unable or unwilling to comply with the Order of this Court, and that to continue to order it to come forward with workable constitutional plans for desegregation would be an exercise in futility. ..." (Jt. Ap. A-106)

Clearly, the District Court concluded that either the inability to comply or the unwillingness to comply gave the Court the power to place the Board in default. The undisputed facts of this case are that it was impossible to comply with the District Court's Order for Interim Relief, and for that matter, it was impossible to comply with the District Court's Order for a comprehensive desegregation plan due to the District Court's viewpoints as to what a constitutionally acceptable plan necessitated.

As of August 18, 1971, Petitioners were found to have been operating a de jure segregated school system. In that Memorandum of Decision, the District Court also concluded that as the Black population in any given school approached forty per cent (40%), more or less, the White population residing in the geographical area serving said school would leave the area, thereby causing the school to become predominantly Black. This could be referred to as the Court's "tipping point" theory.

Interestly enough, the Black student enrollment for the entire school city of Indianapolis approximated forty per cent (40%), more or less; had these Petitioners devised a plan whereby each and every school in the system would have been racially balanced, each and every school in the system would have been at the "tipping point." However, the District Court, in its August 18, 1971, decision, held that tipping point schools are constitutionally undesirable and directed these Petitioners to prevent schools from reaching the tipping point. It follows, that it was simply impossible to devise a plan acceptable to the District Court. This was the underlying theory of the District Court's decision requiring inter-district transportation of pupils. Nevertheless, the District Court condemned the Board for failing to submit a comprehensive constitutional desegregation plan.

In regard to the Order for Interim Relief, which is the order that was the subject matter of the August 20, 1973, hearing that resulted in the Board being placed in default, the undisputed testimony was that the Board could not strictly comply with the Court's Order due to the lack of time remaining before the beginning of school and the absolute lack of adequate transportation facilities. Because of this, the Board was placed in default, and replaced by two Court-appointed Commissioners who also could not comply with that Order due to the lack of time and lack of adequate transportation facilities. However, the Board employees prepared the plan which was finally implemented, though the Commissioners were paid for it.

In summary, the undisputed evidence is that it was impossible to strictly comply with the District Court's Order for Interim Relief. Due to this impossibility, the Indianapolis School Board was placed in default. If this Petition for Certiorari is not granted, then the law of the Seventh Circuit will continue to be that a District Court can place a school board in default, replace said board by a two-man commission and thereafter require that board to expend over $60,000.00 to reimburse the commissioners for services rendered by its own staff, expenses, and attorneys' fees, simply by imposing upon that school board an order with which it is impossible to comply. It is respectfully submitted that this ruling is without precedent, and that it is certainly deserving of reversal on review.

Conclusion

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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